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OF

Cases in Law and Equity

DETERMINED IN THE

S U P R E M E C O U R T

OF THE

STATE OF NEW YORK.

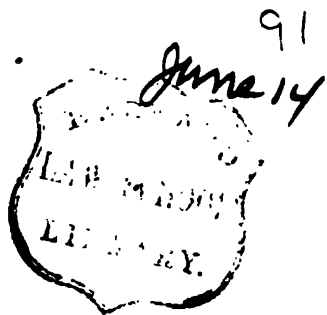
BY OLIVER L. BARBOUR, LL. D.

VOL. XXXI.

ALBANY:

W. C. LITTLE & Co., LAW BOOKSELLERS.

1860,



Entered according to act of Congress, in the year one thousand eight hundred and sixty,

BY WEARE C. LITTLE,

in the Clerk's Office of the District Court of the Northern District of New York.

Rec Dec. 12, 1860

Stereotyped and printed by G. M. Davison, Saratoga Springs.

JUSTICES OF THE SUPREME COURT,

DURING THE YEAR 1860.

FIRST JUDICIAL DISTRICT.

- CLASS 1. BENJAMIN W. BONNEY.*†
" 2. THOMAS W. CLERKE.§
" 3. JOSIAH SUTHERLAND.
" 4. DANIEL P. INGRAHAM.
" 5. WILLIAM H. LEONARD.†

SECOND JUDICIAL DISTRICT.

- " 1. JOHN A. LOTT.*
" 2. JAMES EMOTT.
" 3. JOHN W. BROWN.
" 4. WILLIAM W. SCRUGHAM.†

THIRD JUDICIAL DISTRICT.

- " 1. WILLIAM B. WRIGHT.§
" 2. GEORGE GOULD.*
" 3. HENRY HOGEBOOM.
" 4. RUFUS W. PECKHAM.†

FOURTH JUDICIAL DISTRICT.

- " 1. AMAZIAH B. JAMES.*
" 2. ENOCH H. ROSEKRANS.
" 3. PLATT POTTER.
" 4. AUGUSTUS BOCKES.†

JUSTICES OF THE SUPREME COURT.

FIFTH JUDICIAL DISTRICT.

- CLASS 1. WILLIAM J. BACON. §
 " 2. WILLIAM F. ALLEN.*
 " 3. JOSEPH MULLIN.
 " 4. LE ROY MORGAN.†

SIXTH JUDICIAL DISTRICT.

- " .. CHARLES MASON.*
 " 2. RANSOM BALCOM.
 " 3. WILLIAM W. CAMPBELL.
 " 4. JOHN M. PARKER.‡

SEVENTH JUDICIAL DISTRICT.

- " 1. HENRY WELLES. §
 " 2. ERASMUS DARWIN SMITH.*
 " 3. THOMAS A. JOHNSON.
 " 4. ADDISON T. KNOX.‡

EIGHTH JUDICIAL DISTRICT.

- " 1. BENJAMIN F. GREENE.*
 " 2. RICHARD P. MARVIN.
 " 3. NOAH DAVIS, JUN.
 " 4. MARTIN GROVER.‡

CHARLES G. MYERS, *Attorney General.*

* Presiding Justice.

† Appointed by the Governor, in January, 1860, to fill the vacancy caused by the resignation of HENRY E. DAVIES.

‡ Elected in November, 1859.

§ Sitting in the Court of Appeals.

 ERRATA—VOL. 31.

Page 56, line 16. For "inappropriate" read "*impropriate*."

VOL. 30.

Page 31, line 13. For "Government" read "Governor."

" 55, " 11. For "prohibition" read "protection."

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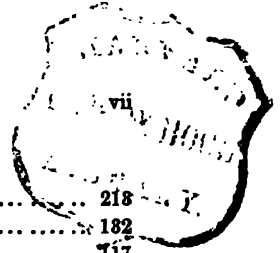
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CASES
IN
Law and Equity
IN THE
SUPREME COURT
OF THE
STATE OF NEW YORK.

CORNELIA J. BERGEN and VICTOR B. BERGEN *vs.* RICHARD
A. UDALL and CORNELIUS J. BERGEN.

31b	9
77 AD	850

Where a daughter, immediately upon her arrival at lawful age, makes a voluntary conveyance for the benefit of her father, the transaction will be examined by the court with the most jealous scrutiny and suspicion.

The person relying upon the conveyance must show affirmatively, not only that the one who made it understood its nature and effect, and executed it voluntarily, but that such will and intention was not in any degree the result of misrepresentation or mistake, and was not induced by the exertion for selfish purposes, and for his own exclusive benefit, of the influence or control which the father possessed over his daughter.

There is no law against a child bestowing upon a parent any property, of which she may be the owner, because she loves him, and desires to promote his interests. But there is an inflexible principle both of public policy and private justice which forbids a parent making use of his influence, or his child's affection, to impose upon her mind a purpose of bounty to him.

If the design to make the gift originated in the mind of the child, or was at least unsuggested by any agency of the parent, the act is as unimpeachable in law as it may be laudable in morals. But if the mind of the donor was

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brought to a purpose preconceived by the parent for his own sole advantage, by an influence which the donor could not escape, in the circumstances in which she was placed, and which is deliberately used to effect such a purpose, then that influence, or its exercise, will be held to have been undue and improper.

In all dealings between parent and child, under such circumstances, the most scrupulous good faith—*uberrima fides*—must be observed; and the weaker party must be put upon an equal footing with the stronger, by a complete disclosure of all material facts, and the abnegation, as far as possible, of any control or dominion, as well as of all mere selfish projects or attempts.

U. being the owner of a tract of land lying on the west side of a certain brook, and the plaintiff, his daughter, an infant under 18 years of age, being the owner of a farm lying opposite, on the east side of the same brook, U. offered to sell to B. a part of his land lying immediately adjoining the brook, but B. refused to purchase the same unless, together with the land, he could secure the right to construct a dam across the stream, so as to pond back the water and overflow the land of the plaintiff. U. thereupon conveyed to B. a part of his said farm lying on the west side of the brook, for the sum of \$17,500, together with the right to B. in perpetuity, to construct across said brook a dam five feet in height, and covenanted in the deed, that the plaintiff should, within six months after arriving at the age of twenty-one years, grant and secure to B. in perpetuity the right to construct, maintain and keep the said dam; the sum of \$4000, the estimated price or value of the privilege being secured to be paid by B.'s bond and mortgage, payable when the plaintiff should, after arriving at the age of twenty-one, execute a deed of confirmation in respect to such privilege. The plaintiff, by a deed dated the same day the deed from U. to B. was executed, conveyed to B. the right and privilege to make a dam across said brook and thereby to submerge her land. This was done with the advice of her counsel, and with the understanding that she could ratify or disaffirm the act when she should reach the age of twenty-one. When she became of age she made no attempt, and gave no indication of a purpose, to complete the gift. On the contrary, upon an officer coming to her father's house to take her acknowledgment to a conveyance of the privilege, she refused to execute the paper. A week later she again declined executing it. Being subsequently thrown from a wagon she was somewhat hurt, and a good deal frightened. While still unwell and hysterical, her father came to see her, accompanied by Mrs. C. the mother of his second wife, who was selected by U. on account of her supposed influence over the plaintiff. Mrs. C. urged her, strongly, to execute a deed of confirmation; telling her it was her duty to her father to do so, and speaking of his necessities. And, carefully ignoring the plaintiff's own rights and interests, Mrs. C. urged that if she refused to sign the deed, no one would be benefited but B., and that the question for her to determine was whether she would benefit her father, or B. The plaintiff, finally, told U. that if he would secure the sum of \$4000, to be paid to her brother

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and sister, at his death, she would confirm the deed. She was informed by U. that he had made a will, and given them more than that amount; and supposing that the \$4000 which her compliance would be the means of procuring from B. would be effectually secured to her brother and sister, at her father's death, she at length executed a deed of confirmation.

Held that the deed, thus obtained, was not the result of the deliberate, unaided and uncontrolled action of the plaintiff's own mind, but was procured by the agency of means and motives, and the suggestions of others. That it was not to be regarded, and could not therefore be maintained, as an act of pure bounty, proceeding merely from the natural affection of a child for a parent; but was the result of a purpose which she was led by others to form; that the plaintiff was therefore entitled to relief against the deed; and that the same should be set aside, unless U. should pay to her the sum stipulated and agreed upon by B. as the price of the privileges to be conveyed to him by her; or, the fair value of the rights and privileges conferred by her deed of confirmation.

Held also, that a deed thus obtained from a grantor, young and inexperienced, not yet emancipated from the natural influence and control of her father, without discreet advisers, whom she could consult, and surrounded by those who were either under the control and influence of her father, or who were actively assisting his purpose and laboring for his interests, the grantor being ill, at the time, could not be sustained; notwithstanding the evidence fell short of showing either gross intentional misrepresentation and fraud, or threats and coercion, on the part of the father.

THE complaint in this case alleged that the plaintiff, Cornelia J. Bergen, was the daughter of the defendant, Richard A. Udall, of his first marriage. That she attained the age of twenty-one years on the 10th day of April, 1857, and was the wife of the other plaintiff, Victor B. Bergen, of the town of Islip, in the county of Suffolk. That the defendant Udall, being the owner of a large tract of land at Islip, lying on the west side of a certain brook called "the Willis brook," and she, the said Cornelia, being the owner and well seised in her own right and estate of a farm lying on the east side of the same brook, which was devised to her in fee by her grandfather, the said Udall offered to sell to the defendant Cornelius J. Bergen a part of his land lying immediately adjoining said brook, but that Bergen refused to purchase the same, unless, together with the land, he could purchase or secure to himself in perpetuity, the right to construct and

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maintain a dam at the great south road or highway leading from Babylon to Patchogue, across the said brook, to the height of about five feet, and so as to pond back the water and overflow the land of the said Cornelia, lying immediately on the east side of the said brook. That Udall, for the purpose, among others, of securing to the said Cornelius J. Bergen the said right, on or about the 1st day of April, 1854, did, by a deed executed by himself and his wife, bearing date on that day, grant and convey to the said Cornelius J. Bergen, his heirs and assigns, for the price or consideration of \$17,500, a part of his farm lying on the west side of said brook, "together with the right to the said Cornelius J. Bergen, his heirs and assigns, in perpetuity, to pond the water in the said brook by constructing and maintaining a dam across said brook at or near the great south road, which shall raise the water of said brook, not exceeding five feet above its (then) present natural surface where the dam shall be constructed." That Udall, in and by said deed, covenanted with Bergen substantially as follows: "Inasmuch as the lands on the east side of the brook hereinbefore mentioned belong to the said Cornelia J. Udall, the daughter of the said Richard A. Udall, who is a minor, and the construction of a dam across the said brook will cause a part or portion of the lands of the said Cornelia J. Udall to be overflowed, and the right or privilege to cause such overflow, hereinbefore granted by these presents being considered by the parties hereto to form \$4000 of the consideration or purchase money hereinbefore in these presents expressed, now in consideration thereof the said Richard A. Udall, for himself, his heirs, executors and administrators, doth hereby covenant, promise and agree to and with the said Cornelius J. Bergen, his heirs and assigns, that the said Cornelia J. Udall shall and will, within six months from the time she shall arrive at the age of twenty-one years, if she be then living, grant and secure in perpetuity to the said Cornelius J. Bergen, his heirs and assigns, or owners of the lands and premises hereinbefore granted, the right and privilege to construct and maintain and

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keep constructed and maintained the said dam across the said brook, and to overflow and keep overflowed so much of the land of the said Cornelia J. Udall as may be required to make a fall of water not exceeding five feet in perpendicular height over the same." That the said \$4000, the estimated price or value of the said privilege, was secured to be paid by the said Cornelius J. Bergen, by his bond and mortgage upon the land and privilege so conveyed to him, to become payable when the plaintiff Cornelia J. Bergen should, after her arrival at the age of twenty-one years, execute and deliver a deed or instrument confirming the right granted as aforesaid. That said Bergen did, soon after the execution and delivery of the deed from Udall to him, construct such dam, to the height of about five feet, which caused the water in said brook to pond back and overflow the land of the plaintiff Cornelia J. Bergen, on the east side of said brook, to the extent of several acres, to the great detriment and injury of the said land, and her right and interest therein. That at the time of the execution and delivery of the said deed to Bergen, and of the bond and mortgage by the latter to Udall, the plaintiff Cornelia J. was an infant under the age of twenty-one years, to wit, of the age of nearly eighteen years, sole and unmarried. That she then lived with her father and his second wife, at Islip; and that on the same day, or soon after she arrived at lawful age, Udall's wife came to the room of the plaintiff Cornelia J. Bergen, and informed her that Mr. Mowbray, a justice of the peace, was coming, or had come, to the house to take her the said Cornelia's acknowledgment to an instrument confirming to the said Cornelius J. Bergen the said right, and urged her to prepare herself to see the said justice and acknowledge the said instrument. That the said Cornelia stated to her said stepmother that she had considered the matter, and had come to the conclusion not to sign away her right, and that she would not see the justice, nor sign the instrument; whereupon Mrs. Udall with violence took hold of her and shook her, and commanded her to go before the justice and sign and acknowl-

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edge the instrument ; and as an inducement for her to do so, Mrs. Udall represented to her, in the presence of her father, that he was in very great want of the money to be paid on the mortgage so soon as said instrument should be signed and acknowledged by her, and that if she did not sign it, or he did not get the money, he would have to go to prison ; but that the said Cornelia still persisted in her refusal to see the justice or sign the instrument, and did not sign it. That on the same day, or the next following, the said Cornelia left her father's house, and went to the house on her own land, occupied by her maternal great uncle, Joshua Willis, where she continued to reside until her marriage with the plaintiff, Victor B. Bergen, and where she now resides. That while the said Cornelia was residing at the house of said Willis, and within a day or two after she had left her father's house, the said Cornelius J. Bergen tendered to her an instrument in writing to sign, confirming to him the said right or privilege so granted to him as aforesaid ; that a justice of the peace was there, also, to take her acknowledgment thereof, but that she, in the presence of her said uncle and of her guardian, Samuel J. Underhill, and of said Cornelius J. Bergen, again refused to sign or acknowledge the same. That on the next day or two thereafter she was accidentally, while riding, thrown from a carriage, which caused her great bodily pain, nervousness and illness, so as to confine her to her bed for two or three days. And that, while suffering with that illness, Mary Ann Carll, the mother of Mrs. Udall, and in whose presence the said Cornelia always felt great restraint, came with Mr. Udall to the house of the said Joshua Willis, and into the room where the said Cornelia then was confined to her bed, and by urgent and pressing importunities of her father's necessities for money, and of her duties which as a daughter she owed to her father, and various other similar appeals, made in the presence and hearing of her father, and to get rid of their presence and importunities, and so that she might have peace and quiet, which in her then condition she so much re-

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quired, she, the said Cornelia, did sign an instrument in writing, a copy of which was annexed, marked schedule A. That no consideration whatever was paid to her for signing the said instrument in writing, and that the same was so obtained from her by her said father, as aforesaid, and without any consideration whatever. That the price or consideration money for said right or privilege, which was secured to be paid by said bond and mortgage, of right and in justice, belong to the said Cornelia J. Bergen. That Richard A. Udall, at the time of the execution of the deed and grant to Cornelius J. Bergen, well knew, and Mrs. Udall and Mrs. Carll, at the time of their so importuning and urging her to sign the said instrument, well knew, that the price or consideration money for the right or privilege so granted to Bergen, rightfully belonged to her the said Cornelia, and that she was desirous that the money should be secured for the benefit of her sister Phebe, and her brother Richard, who were not as well provided for as herself. That on one or two occasions after the said Cornelia had arrived at lawful age, and before the said instrument was signed by her, Mrs. Carll represented to her, as one inducement to sign the same, that her father had made his last will and testament, in which he had made provision for all his children to share equally alike; that she had seen the will, and that Phebe Udall and Richard Udall, the brother and sister of the said Cornelia, would get thereby more than the amount secured by said mortgage. That her father and his wife had before then also made similar representations, which she then believed, but that said representations were wholly untrue. That the said instrument in writing, so signed by the plaintiff, Cornelia J. Bergen, was signed and delivered by her to her father by undue and improper influences, means, promptings, importunities, fraudulent representations and commands, used and practiced upon her so as aforesaid, and against her free will and consent, and while she was under restraint. That the said instrument had been proved, sufficiently to entitle it to be recorded, and it had been recorded, in the clerk's office of

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Suffolk county. And the plaintiffs claimed, and insisted that the same ought to be declared null and void by this court, and ordered to be delivered up and canceled of record; and that the said Cornelia should be decreed to be entitled to the price or consideration money for the said right, so granted to Bergen, and which was secured to be paid by the said bond and mortgage, to Udall, upon her executing, freely and voluntarily, an instrument confirming such rights. That Udall is pressing Cornelius J. Bergen for the payment of the moneys secured by the said bond and mortgage, and threatens to take proceedings to foreclose the same, and to use and set up the instrument in writing so signed by the said Cornelia, as good and valid in the law, and as a full performance of the covenant on his part in the said deed contained, and as entitling him to the money secured by the said bond and mortgage. Whereas the plaintiffs charged and alleged to the contrary, and insisted that the said instrument in writing was null and void, and ought to be so declared, for the reasons aforesaid. And the plaintiffs insisted that the defendant Richard A. Udall ought to be restrained by the order of this court from using, setting up, or attempting to use or set up, the said instrument as valid, in any action or proceedings at law or in equity, and also from claiming or asserting any right or benefit under the same, and to pay the costs of this action; and that Cornelius J. Bergen ought also to be restrained from claiming or deriving any benefit under said instrument, as against the said Cornelia J. Bergen, or her rights in her lands so overflowed as aforesaid.

And the plaintiffs prayed for a judgment that the instrument in writing so signed by the said Cornelia J. Bergen ought to be, and is, null and void as having been obtained from her by fraud, imposition, fear, and undue influence, and that the same be adjudged to be delivered up and canceled of record; and that Udall might be restrained from using, setting up, or attempting to use or set up, the said instrument as valid, in any action or proceedings at law or in equity, and

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from claiming or asserting any right or benefit under the same; and that Cornelius J. Bergen might also be restrained from claiming or deriving any benefit under said instrument, as against the said Cornelia J. Bergen, or her rights in her said land, until the further order of the court; and for further and other relief.

The instrument in writing referred to in the complaint, and set forth at length in schedule A. annexed thereto, executed by the plaintiff Cornelia J. Bergen after she became of age, was dated April 20, 1857. It recited the execution of the agreement by her, on the 1st of April, 1854, while an infant, by which she had granted to Cornelius J. Bergen the right to erect a dam and overflow certain lands of hers; and that Bergen had in his possession the said agreement, and refused to surrender the same for ratification, confirmation and acknowledgment by her; and that she was now of lawful age, and desirous to have the execution of the said agreement completed by her acknowledgment. She then fully and completely ratified, confirmed and secured unto the said Cornelius J. Bergen all and singular the rights, privileges and immunities contained and expressed in said agreement; and also acknowledged the execution of the same, and declared such execution to be valid and binding upon her.

The defendant Cornelius J. Bergen did not put in any answer.

The defendant Udall answered separately, denying most of the allegations in the complaint. Especially he denied that he offered to sell to Cornelius J. Bergen the land in the complaint referred to, and that Bergen refused to purchase the same unless upon the condition stated in the complaint; but he alleged that he did offer for sale a part of his farm lying on the west side of the brook, for the price or sum of \$17,500, and that Bergen offered to purchase the same at that price; and before the purchase was concluded, Bergen expressed a desire to secure to himself the privilege to raise a dam and flow back the water over the land of said Cornelia J. Bergen.

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That Bergen offered to erect and maintain said dam, and the terms and conditions on which the offer was made were such as appeared to the defendant would be highly advantageous to the said Cornelia J., and would tend greatly to increase the value of her property; and in consideration thereof, and for the purpose of inducing Bergen to erect and maintain said dam, and for no other purpose whatever, the defendant agreed, as a part of the terms of sale, to leave \$4000 of the purchase money unpaid, and to be secured by the purchaser's mortgage upon the premises sold; the payment of which should be contingent upon the said Cornelia ratifying and confirming to Bergen the right to overflow her land, after she became of age. That the defendant and his wife thereupon executed a deed to Bergen, of the premises sold. But he denied that by said deed any reference was made, directly or indirectly, to the right to construct and maintain a dam across said brook, or to pond the water thereof; and he alleged that he refused to sign a deed prepared by Bergen, containing the covenants stated in the complaint. He denied that the said sum of \$4000 was the estimated price or value of said privilege, or that the same was secured to be paid by Bergen by his bond and mortgage upon the land and the privilege so conveyed. He alleged that previous to his going to the house of Joshua Willis, where the plaintiff Cornelia J. Bergen was staying, he had repeatedly endeavored to procure from Cornelius J. Bergen the said original grant so executed and delivered to him by said Cornelia, to the end that he, the defendant, might present the same to the said Cornelia to be acknowledged by her; but that Bergen had always refused to deliver the same to him, or to give him a copy thereof for that purpose. That in consequence thereof, he, the defendant, prepared the instrument, a copy of which was annexed to the complaint, and took the same with him when he went to Willis' house. The defendant admitted that no money consideration was paid by him to said Cornelia, at the time she signed the said last mentioned instrument; but he denied that the signing of the in-

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strument was obtained from her without any consideration whatever. On the contrary, he alleged that the great value of the pond, and the benefit derived therefrom by the increased value of her farm, was the consideration therefor, and that such consideration was ample.' The defendant also denied, generally, that the instrument in writing so signed by the said Cornelia J. Bergen was signed and delivered by her by any undue and improper influence, means, promptings, importunities, or fraudulent representations and commands, used or practiced upon her by any person or persons whatsoever, or against her free will and consent; or that said instrument was obtained from her while under restraint, or against her free consent. And he denied that the instrument ought to be declared to be null and void, or to be decreed to be delivered up and canceled, for any reasons whatever; or that the said Cornelia J. Bergen was entitled to the money secured to be paid by said bond and mortgage, or any part thereof. He also denied that he was using or intending to use and set up said instrument as a full performance of any covenant on his part, or that he ought to be restrained as prayed for. And he alleged that the plaintiffs were colluding to prevent the collection by the defendant of the said bond and mortgage, and that this action was brought by and through such collusion.

The cause was referred to a referee, upon whose report of the testimony taken before him the action was brought to a hearing before the court, at a special term. The material facts established by the evidence are sufficiently detailed in the opinion of the court.

W. J. Cogswell, for the plaintiffs.

J. Lawrence Smith, for the defendants.

EMOTT, J. The right to pond and to fish, which was conveyed to the defendant Bergen by Cornelia J. Udall, was cer-

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tainly of some and probably of considerable value. Although there is some discrepancy in the statements or opinions of the witnesses on this point, and some of them consider the damming of the stream and construction of a pond an advantage to the property of the plaintiffs, yet this is not inconsistent with the fact that the owner of the adjoining property would prefer to pay a considerable sum, rather than forego the privileges conferred by this instrument. The conduct of the defendants, at the time when the bargain for the purchase and sale of Udall's farm was made between them, shows that the purchaser considered the right to flow the lands of Cornelia Udall, and to fish in the waters thus ponded, material to his purchase. It was expressly stipulated for and carefully secured under penalty of the loss of \$4000 of the purchase money, in case the young lady refused to confirm the agreement when she attained her majority. If it would be going too far, on the present evidence, to say that the parties fixed this amount as the precise price or value of the right, still if it had been greatly disproportionate to that value, Mr. Udall would hardly have consented, while selling his farm, thus to make the payment of \$4000 of the purchase money contingent upon the assurance of this privilege by his daughter—an assurance which he knew of course that he could not legally and ought not to attempt to control. The precise value of the right to be thus obtained, however, is not very important in the decision of the main question now before me; it is sufficient that I cannot help seeing very clearly that in the transaction in question, while this young lady neither paid nor received any price, she was not bargaining for or receiving a benefit, but was parting with something which was her property. She did in fact make a voluntary conveyance of an easement in her lands of very considerable importance to the defendant Bergen, and therefore, if not for other reasons, possessing pecuniary value to her. This conveyance is not alleged by the complaint to have been improperly procured by the grantee, but to have been obtained by the father of this young woman, under circum-

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stances which it is said compel this court to set it aside. The plaintiffs' counsel is correct in saying that it is not material that the conveyance was not made to the father, the defendant Udall. It was made for his benefit, to a person indicated by him, and by his request and procurement, and the grantee, if not in fact privy to whatever there is in the case to impeach the conveyance, has not pleaded that he is a purchaser without notice, and cannot avail himself of such a defense. There is, therefore, no question of the rights of third parties in the case; and the controversy is to be determined just as if the deed made by Miss Udall had been made to, as it was for the benefit of, her father. If he could not retain it upon the facts of the cause, neither can the actual grantee, Bergen.

This, then, is a voluntary conveyance obtained from a child by her parent within a few days after her arrival at age. She became of age on the 10th and she executed this deed on the 20th of April, 1857.

The protection of persons who are either in a condition of tutelage or dependence, or just emancipated from it, and the rigorous scrutiny of deeds and agreements obtained from such parties by those who occupy such relations of confidence or control towards them, have long formed a recognized head of equity jurisprudence. Without going back through the long series of cases in which the doctrines of courts of equity on these subjects have been illustrated and enforced, it will be sufficient to recite the language of a few recent adjudications and text books of authority in which the rules by which the court acts are clearly laid down.

Judge Story remarks, (*Eq. Juris.* § 307,) "In this class of cases there is often found some intermixture of deceit, imposition, overreaching, unconscionable advantage or other mark of direct and positive fraud. But the principle upon which courts of equity act in regard thereto, stands, independent of any such ingredients, upon a motive of public policy. These courts will therefore often interfere in such cases, where, but for such peculiar relations, they would wholly abstain from

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granting relief, or grant it in a very modified and abstemious manner." Again, § 308, "courts of equity do not sit or affect to sit in judgment upon cases as *custodes morum*, enforcing the strict rules of morality. But they do sit to enforce what has not inaptly been called a technical morality. They will not arrest or set aside an act or contract merely because a man of more honor would not have entered into it. There must be some relation between the parties which compels *the one to make a full discovery to the other, or to abstain from all selfish projects*. But when such a relation does exist, courts of equity acting upon this superinduced ground in aid of general morals, will not suffer one party standing in a situation of which he can avail himself against the other, to derive advantage from that circumstance." The learned commentator applies these principles to transactions between parent and child, with directness and force; and the language which I have been quoting is cited with approval by Mr. Justice Daniel, in delivering the opinion of the supreme court of the United States, in *Taylor v. Taylor*, (8 How. 199.) In that case a deed from a child to her parents just after her majority, was set aside as a transaction bearing upon its face in false recitals of the deed, and similar statements repeated in a letter signed by her and delivered to her parents with the deed, evidence of the use of fraud, and the presence of undue influence, to procure it. There was no direct evidence of such facts in the case, but the court asserted the presumption which attaches to such cases; in the language of the learned judge, "transactions subject to presumptions never attaching *a priori* to contracts between parties standing upon a perfect equality;" and then declared that the manner of the execution of the deed and the facts surrounding it strengthened instead of repelling this presumption, and required of the court to set it aside without direct evidence of fraud. In *Archer v. Hudson*, (7 Beav. 551,) Lord Langdale, M. R. lays down the rule that a security obtained through the influence of a person standing *in loco parentis*, from the object of his protection, cannot stand.

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He explains his meaning in this way: "If there be a pecuniary transaction between a parent and child, just after the child attains the age of twenty-one years, and prior to what may be called a complete emancipation, without any benefit moving to the child, the presumption is that an undue influence has been exercised to procure that liability on the part of the child; and it is the business and the duty of the party who endeavors to maintain such a transaction, to show that that presumption is adequately rebutted; and that it may be adequately rebutted is perfectly clear. This court does not interfere to prevent even an act of bounty between parent and child, but it will take care (under the circumstances in which the parent and child are placed before the emancipation of the child) that such child is placed in such a position as will enable him to form an entirely free and unfettered judgment, independent of any sort of control. The question then is whether, under the circumstances of this case, we have any evidence of that kind." For the want of such evidence the transaction was set aside.

In *Dent v. Bennett*, (4 M. & C. 269,) Lord Chancellor Cottenham quotes with approbation the argument of Sir Samuel Romilly in *Huguenin v. Baseley*, where that accomplished lawyer said that the relief stands upon a general principle applying to all the variety of relations in which dominion may be exercised by one person over another.

In *Hoghton v. Hoghton*, (11 Eng. L. and Eq. Rep. 134,) Sir John Romilly, M. R. first clearly states the rule, on the authority of Lord Eldon in *Gibson v. Jeyes*, (6 Ves. 266,) that whenever a man takes a voluntary donation he must assume the burden of proving the transaction righteous, that is, of showing that the donor understood what he was doing; and in the next place, upon the same authority in the noted case of *Huguenin v. Baseley*, (14 Ves. 273,) that where the donor and donee were so situated towards each other that undue influence might have been exercised, the question is not merely what was the intention of the donor, but how that intention

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was produced. He then proceeds: "In many cases the court, from the relations existing between the parties to the transaction, infers the probability of undue influence having been exerted, and in such cases the court watches the whole transaction with great jealousy, not merely for the purpose of ascertaining that the person likely to be so influenced fully understood the act he was performing, but also for the purpose of ascertaining that his consent to perform the act was not obtained by reason of the influence possessed by the person receiving the benefit. This court holds as an inseparable condition, that this influence must be exerted for the benefit of the person subject to it, and not for the advantage of the person procuring it."

The same learned judge, in *Casborne v. Barham*, (2 Beav. 75,) said, that in certain cases there is so great an inequality between the contracting parties, so much of habitual exercise of power on the one side, and habitual submission on the other, that without any proof of the exercise of power beyond that which may be inferred from the transaction itself, a court of equity will impute an exercise of undue influence.

This case, with others, is cited by Judge Gridley, in giving the opinion in the recent case of *Sears v. Shafer* in the court of appeals, which contains a similar doctrine asserted and applied. There was, in that case, no direct proof of the manner in which the instrument in question was procured. But there was an intimate and confidential relation between the grantor and grantee, and a temper and disposition to yield by the latter to the former. There was evidence of intercourse between them in which the paper might have been procured. The grantor was sick and enfeebled as well as ignorant, and there was no proof that what she was doing was explained to her. The conveyance was without consideration, and was of a character inconsistent with her natural feelings and affections, as well as her interests. The learned judge who delivered the judgment of the court of appeals says that there are cases in which undue influence will be inferred from the nature of the transaction, together with the exercise of occasional or habitual

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influence. The court did not hesitate to restore Judge Barculo's decree, by which the deed in question had been annulled, as falling within these rules; although that decision had been reversed at the general term.

From the authorities thus collected and the numerous older cases to which they refer, I deduce these principles. A transaction like the present, in which a daughter immediately upon her arrival at lawful age makes a voluntary conveyance for the benefit of her father, will be examined by the court with the most jealous scrutiny and suspicion. The person relying upon it must show affirmatively not only that the person who made it understood its nature and effect, and executed it voluntarily, but that such will and intention was not in any degree the result of misrepresentation or mistake, and was not induced by the exertion, for selfish purposes, and for his own exclusive benefit, of the influence or control which he possessed as a father, over his daughter. There is no law against a child bestowing upon a parent any property of which she may be the owner because she loves him and desires to promote his interests. But there is an inflexible principle, both of public policy and private justice, which forbids a parent making use of his influence or his child's affection, to impose upon her mind a purpose of bounty to him. If the design to make the gift originated in the mind of the child, or was at least unsuggested by any agency of the parent, the act is as unimpeachable in law as it may be laudable in morals. But if the mind of the donor was brought to a purpose preconceived by the parent for his own sole advantage by an influence which she could not escape, in the circumstances in which she was placed, and which is deliberately used to effect such a purpose, then that influence or its exercise was undue and improper. And in all dealings between parent and child, under such circumstances, the most scrupulous good faith—*uberrima fides*—must be observed, and the weaker party must be put upon an equal footing with the stronger by a complete disclosure of all material facts, and the abnegation as far as possible of any con-

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trol or dominion, as well as of all mere selfish projects or attempts.

Miss Udall was about 18 years of age when Mr. Bergen purchased her father's farm. She then signed a conveyance to him of the right to pond the stream which runs between her lands and his. This was done with the advice of Judge Strong, in whom she evidently and justly reposed great confidence. He testifies that he explained the matter to her as to the effect of the pond upon her property, giving it as his opinion that the property would be more valuable with it than without it, and telling her she would be able to see, before she came to an age to ratify her deed, whether this opinion was correct. Judge Strong says that she expressed herself willing to do whatever he should advise, and that he supposed, and still thinks, she understood that she could ratify or recant the act when she reached the age of twenty-one.

From this time until she attained her majority we hear no more of the matter. When she reached that period it is quite evident that she had not made up her mind as to her action, or at least that she had not determined to make the gift or conveyance.

And the first and a very material observation upon the deed now in question is, that it is plainly not an act of unsolicited bounty, or the free gift of her affection for her father. She made the first deed while under age, upon the advice of Judge Strong, and as he says, aware no doubt of the *locus pœnitentiæ* which she possessed, and of the ineffectual character of her act, so far. When she became twenty-one years of age, she made no attempt, and gave no indication of a purpose, to complete the gift. We cannot avoid seeing, without advert-
ing to the particulars of the transaction, that this deed was obtained from the young lady, not proffered by her. It was not the result of the deliberate, unaided and uncontrolled action of her own mind, but was produced by the agency of means and motives and the suggestions of others. The deed is not to be regarded and cannot therefore be maintained as

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an act of pure bounty, proceeding merely from the natural affection of a child. It was the result of a purpose which she was led by others to form, and I am brought necessarily to the examination of the manner in which that intention was produced.

Miss Udall is by no means deficient in intellect, as far as I can judge from the proofs in this case, and there is no evidence of extreme or overweening fondness on her part for her father. She is not shown and cannot be supposed to have possessed at this time more than a very imperfect acquaintance with business, or with the ultimate effect upon her property of the conveyance she was desired to make. She seems to have relied in the first instance upon the advice of Judge Strong; but when the question was presented to her for final action, there was no one about her to whom she could resort for disinterested and competent advice. She did indeed ask advice of her uncle Joshua Willetts, and her guardian Samuel J. Underhill, but neither of them felt qualified to direct her; and the latter, who did undertake to negotiate at one time for her interest, was not at hand when her father and his wife's mother finally procured the conveyance. She was living in her father's house up to the time of her coming of age, and left there to go to her uncle's of whom I have spoken, the same evening that she became twenty-one, partly, it is probable, to accomplish her marriage, to which her father was averse, and partly, it would seem, in consequence of a somewhat rude effort which was made by her stepmother to procure her signature to this deed. On the 10th of April, the day that Cornelia J. Udall became of age, Dr. Mowbray was sent to Mr. Udall's house, and Mrs. Udall bringing him into the room, told her stepdaughter that he had come to take her acknowledgment to a conveyance of this interest. She refused to execute the paper. Mrs. Udall told her she must do it. She started to get up from her chair, and Mrs. Udall pushed her back and told her she should sign it. She did not, however, and shortly left the apartment and went to her room, in considerable agitation. She had not,

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therefore, at that time, formed a purpose to bestow this benefit upon her father; and it is hardly consistent with this or with other parts of the transaction, to suppose that her final conclusion was due to mere love and affection. The manner in which she was approached by her stepmother shows, on the other hand, that her father and his friends intended to procure this deed at the earliest opportunity, without waiting until she should be actually as well as legally emancipated, and by any means most likely to succeed.

After this a week elapsed, during which the plaintiff was at her uncle Joshua Willetts. She had been approached by Mr. Bergen with the deed, though whether he did so with any real intention or desire that she should execute it, is perhaps doubtful. Still the plaintiff had again the opportunity to make the conveyance, but again declined to do so. About a week from the day she left her father's house she was thrown from a wagon, somewhat hurt and a good deal frightened. She seems to have been unwell and hysterical for several days afterwards. The next day but one after the accident befell her, her father came to see her, bringing with him Mrs. Carll, the mother of her father's second wife, who was selected by Mr. Udall on account of her supposed influence over this young lady. Her uncle, who was an old man apparently of no great force of character, and a woman named Powell, were present during a part, and a younger sister of the plaintiff during the whole, of the interview that followed. The plaintiff was lying in or on the bed when they entered, and Mrs. Carll very soon began to speak of the difficulties upon this subject between her and her father, and the plaintiff turned away at first with a gesture of impatience. Mrs. Carll, however, persevered in urging the matter upon her, and told her it was her duty to her father to make this deed, appealing also, as one witness says, although Mrs. Carll does not remember it, to her father's necessities. During the previous week the plaintiff, as I have stated, was presented with the deed for signature or acknowledgment, by Cornelius J. Bergen. At

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this interview Mr. Samuel Underhill was present. She appealed to him for advice, but he only told her if her mind was not made up, to delay a few days, declining to advise her on the principal question. He told her, however, that as her father had a considerable sum contingent upon her making this deed, she ought to state to him her objection to it. She then authorized Mr. Underhill to tell her father that if he would secure four thousand dollars, or such other sum as might be agreed upon, to be paid to her brother and sister at his death, she would confirm the deed. This message was given to the defendant, and he replied that he had given them so much more, in his will. This subject was alluded to in the conversation between Mrs. Carll, Mr. Udall and his daughter, on the 20th, and Cornelia said she would sign the paper if her father would give the four thousand dollars to her brother and sister; she did not want it herself. She was then told by her father or Mrs. Carll, or both, that he had made a will and given them more than that amount. I cannot doubt that this was one main inducement to her to execute the paper, and that she supposed that the money which this transaction was to put in the hands of her father would be effectually secured to her brother and sister at his death, as she had desired and insisted it should. If Miss Udall had been in a position of equality, laboring under no disadvantages in dealing with her father, she might have been left to suffer the consequences of exchanging her property for her father's promise to make a will, or even his will already made. But it was the duty of those who solicited this gift from the young lady, under the circumstances of this case, either to secure this sum of money to her brother, or to her brother and sister, as she desired and insisted; or else to explain to her, fully, the effect of the alleged will of her father upon the object she desired to accomplish. She ought to have been informed that the ultimate benefit which she wished to secure to her brother and sister would be dependent upon not only the inclination but the circumstances of her father; that as he might at any subsequent

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time by another will deprive them of the benefit which he now professed to have conferred upon them, so his circumstances might become or might even then be such as to make it impossible for them to receive any such benefit at his hands. The plaintiff seems to have been disposed to insist upon securing what she not unnaturally regarded as the price of what she was parting with to her blood relatives—the children of her own mother—and to have finally executed this conveyance, supposing she had done so. As I have already said, if she had been a person of mature age, of ordinary experience and free from all control or influence, she could not have been heard to complain, if she had ignorantly or too confidently made a mistake in this particular. But it is a serious objection to this deed from a daughter who had just attained her majority, to her father, that she was suffered to make it under the belief that a bequest in her father's will would be an adequate assurance that the purchase money would ultimately go to her brother and sister.

But a still greater objection to the transaction I find in the manner in which the consequences of her determination to make or not to make the conveyance were presented to her. Mrs. Carll impressed upon her that if she refused to sign the deed, no one would be benefited but Mr. Bergen, and that the question for her to determine was whether she would benefit her father or Mr. Bergen; whether her father or Mr. Bergen should have the money. Her own rights and interests were carefully ignored. She was not told that if she declined to confirm her first conveyance, she instead of her father would hold a claim upon Mr. Bergen, and could exact compensation for the privilege of plying, and control or dispose of the right of fishing. If no one were interested in her decision but her father and Bergen, if the result of her refusal to do what she was urged to do would be that Bergen would keep what he had and her father would lose four thousand dollars, the young lady might well assent to what was asked of her. But if she had understood, as we see now, and these parties knew then, that she

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held the key to the matter for her own benefit, and that she could exact any fair price, and she might well suppose this four thousand dollars to be the measure of such a price, as a compensation for a privilege which Mr. Bergen deemed essential, there would have been quite a different question presented for her decision. It is not credible that these parties supposed that this privilege possessed no marketable money value; and it was their duty to apprise her distinctly that there was such a value, and that until she conveyed away her rights, that value belonged to her, and not to mislead her to suppose that the only effect of her action, one way or the other, would be to benefit either her father or Mr. Bergen. After what I have now mentioned had occurred, the conveyance or deed of confirmation to Bergen was read over to her by her father and she signed it. It was witnessed by her sister and Mrs. Carl, and her father took it away with him.

This case differs from most of the cases of a similar character which are presented to the courts, because the entire history of the transaction is disclosed in evidence, and we learn all that was said and done by the parties, so that the means used and the motives urged to obtain the plaintiff's consent are matter of proof and not of conjecture. It is quite true that we cannot, upon this evidence, impute to the defendant either gross intentional misrepresentation and fraud, or threats and violent coercion. It is also plain that the plaintiff understood that she was signing a deed confirmatory of her former act, and which would confer upon Bergen the right to maintain the pond which he had constructed, and would put four thousand dollars in her father's pocket. But this is not all which the defendant must establish to sustain such a conveyance. His daughter was young and inexperienced, not yet emancipated from the natural influence and control of her father, and surrounded mainly if not entirely by those who were either under the like control and influence, or who were actively assisting his purpose and laboring for his interests. She was also at the moment suffering under the effects of an

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accident, from which her nerves certainly had not yet fully recovered, if she was not more seriously indisposed. She was therefore in every respect acting at a disadvantage in treating with him in such matters, and the policy of the law and the rules of the courts, no less than a high toned morality, required of him not to take, much less to seek, any thing from her weakness. He pursued her from the moment that she came of age in order to obtain this deed, with a single regard to his interests and not hers, when he was bound, in the language of Judge Story, to abstain from all selfish projects. He did not allow her time to reflect, to consult with any competent and disinterested adviser, or to see how her interests would be affected by what he desired, or how she could secure the conditions which she had stated to him. He allowed, if he did not induce her to suppose, that after the four thousand dollars had passed into his hands, it could nevertheless be secured to her relatives by his will or his promise to make a will. He led her to suppose that she had nothing to gain by any course she could take, and that all she had to decide was whether the money should be paid to him, or he should be cheated out of it by the purchaser. And he enforced these representations by his presence and influence with her in her enfeebled state, without any one at hand to encourage any resistance to the control which he must have had over a daughter, and by urgent appeals to her duty, enforced, as one of the witnesses says, by reference to his necessities. I think a court of equity cannot refuse to interfere in such a transaction, without departing from the rules which are clearly marked out in the decisions. As is remarked by Judge Story, it is in some sense a technical code of morals which we apply to such cases, and it condemns transactions between parties in these peculiar relations, which between man and man standing as equals in fact, or even in the eye of the law, no one could impeach. Still these are wise and necessary rules, and public policy demands that they should be firmly applied, notwithstanding possible hardship in particular cases. It is indeed safer and better, in my judg-

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ment, to run the risk of error in holding such transactions to too rigid rules, even in cases where the evidence is as closely balanced as it may seem to be here.

The defendant relies upon the testimony of Dr. Mowbray as to what took place the next day after this deed was signed, and upon the two letters of the plaintiff written on that day, to sustain his view of the case, or to show a deliberate confirmation of her acts by the plaintiff. Dr. Mowbray went on Tuesday to take the plaintiff's acknowledgment of the original agreement, which he says was produced by the Bergens. She acknowledged the execution of that paper, and expressed her willingness to make the conveyance. She inquired if the paper which she had signed the day before contained any thing more than the original agreement, stating that she had read it, but was not sure if she recollected it. One of the papers had been left with the Bergens, and the other with Mr. Udall. Alexander Bergen, the defendant's brother, offered to deliver the one held by him if Udall would surrender the one procured by him. On the same day she wrote to her father, stating that she had acknowledged the old deed, and insisting earnestly that the one which he had should be returned according to his promise, as she alleges. To this letter he seems to have written an answer, and then she wrote him again, saying that the original deed was acknowledged and ready to be delivered, if he would give up the other. She manifests great anxiety, for her own safety as she says, that the latter instrument should be destroyed. She then goes on to tell him of her instantly approaching marriage, to which he was opposed. She deprecates his anger and his interference, and pleads very earnestly for his acquiescence, and she asks him to send her a dress which she had prepared for the occasion, but which she had left at his house.

Now if the question were whether the plaintiff knew and intended what she was doing when she signed the deed, this testimony and these letters would be conclusive. But in the language of Lord Eldon, in *Huguenin v. Baseley*, cited by the

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master of the rolls in a case already referred to, (*Hoghton v. Hoghton*, 11 *Eng. L. and E.* 138,) the question is not whether the donor knew what she was doing, but how the intention was produced; and upon this point these letters and the plaintiff's interview with Mowbray throw little if any light. They do not remove the difficulties attending that part of the case, or explain the manner in which she was brought to consent to the deed, so as to clear it of the unfair and unequal dealing which the circumstances impute to the defendant. Indeed the letters disclose an agitated and disturbed state of mind, and raise a doubt whether her approaching marriage, and the apprehension of her father's displeasure and possible interference, did not enter into the motives which led her to comply with his wishes, and at the same time contribute more or less to unfit her to form a deliberate judgment or arrive at an independent purpose in dealing with her parent.

I have come to the conclusion that the plaintiff is entitled to relief against this deed. In ordinary cases that relief would consist in absolutely annulling the instrument. But there are some peculiarities about this case. The plaintiff seems to have been willing to make this deed for a consideration, if that consideration could be secured to her brother and sister. In her complaint, she claims the price for which this privilege was sold by her father, or the \$4000 mortgage which was made contingent upon her confirming it; and she asks either to have her deed declared void as to her, or for such other relief as may be just. It is also to be observed that this is not a conveyance of a parcel of land which will revert at once to the grantor, and be in her possession and at her disposal, if her deed is set aside. It is a grant of an easement—of a right to erect a dam and flow back the waters of a stream upon the plaintiff's lands, and to fish in those waters. The privilege thus obtained has been executed, and a pond made which overflows in part the plaintiff's lands, but in part also the lands of Bergen. If the plaintiff's deed were absolutely set aside, this pond and its privileges could not fall into the possession

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and enjoyment of the plaintiff, nor would she regain at once her original rights, or restore her property to its original condition. She would be driven to an action at law for her damages, or to obtain the prostration of the dam, and this latter course would probably not be so beneficial to her as its continuance with compensation to her for its erection. But all the parties to these controversies are before the court in the present action, and I see no difficulty in disposing of all the questions between them. It will therefore be referred to George G. Reynolds, Esquire, to ascertain, first, whether any sum was stipulated and agreed upon by the defendants as the price of the privileges to be conveyed to Cornelius J. Bergen by the plaintiff Cornelia J. Bergen; and if not, then what at the date of her majority was the fair value of the rights and privileges conferred by her deed. Upon the coming in and confirmation of his report, a judgment must be entered, setting aside the conveyance made by the plaintiff, unless within two months after notice of such judgment, the defendant Udall shall pay to her the amount so reported due her, with interest from the 10th of April, 1857. If such payment be made, the deed is to be confirmed and made valid, and the bond and mortgage of the defendant Bergen may be enforced by Mr. Udall for his own benefit. The question of costs is reserved until the final judgment. If the alternative offered to Mr. Udall shall be accepted by him, I suggest and recommend to the plaintiff to acquiesce in that disposition of the matter, without insisting upon costs.

[SUFFOLK SPECIAL TERM, June 1, 1858. *Emott*, Justice.]

CLAFLIN & SALTERS *vs.* SANGER.

A statement of indebtedness, made on a confession of judgment, in these words: "Promissory note for a specified date and amount, which note was given to L. W. & Co. for goods, wares and merchandise theretofore purchased of L. W. & Co. by the defendant, which note was indorsed by the debtor and came into the hands of the plaintiffs for a valuable consideration," *held* defective, in not stating the facts out of which the indebtedness arose.

MOTION by a judgment creditor of the defendant, to set aside the judgment in this case for a defect in the statement of indebtedness. The judgment was entered on a confession. The statement of the indebtedness was as follows: "Promissory note for a specified date and amount, which note was given to L. W. & Co. for goods, wares and merchandise theretofore purchased of L. W. & Co. by the defendant, which note was indorsed by the debtor, and came into the hands of the plaintiffs for a valuable consideration."

John H. McCunn, for the creditors.

I. T. Williams, for the defendant.

INGRAHAM, J. The objection to this statement is, that it does not state the facts out of which the indebtedness arose. In all the cases it is conceded that the object of the statute was to compel the debtor to disclose so much of the transaction out of which the indebtedness arose, as to enable the creditor to form a more accurate opinion as to the integrity of the debtor in confessing the judgment, and for this purpose to compel the parties to spread on the record a particular and specific statement of the facts out of which the indebtedness arose. (*Chappel v. Chappel*, 2 *Kernan*, 215.)

The precise question as presented in this case appears to have been passed upon by the general term in this district, in *Moody v. Townsend*, (3 *Abb.* 375.) Roosevelt, J. in that case says: "A general allegation that the judgment was for goods sold and delivered," is not a compliance with the requirements of the statute.

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In *Freligh v. Brink et al.* (16 How. Pr. Rep. 272,) Brown, J. held that a statement which averred the indebtedness to have arisen on a note for \$700, that amount of money being had by the defendant of the plaintiff, and which was due, was insufficient. In *Stebbins v. The Meth. Episcopal Church*, (12 How. Pr. Rep. 410,) Smith, J. held that a statement of indebtedness for money lent and advanced by the plaintiff to the defendant, and which had been used to pay his debts, was insufficient, because it did not state when the money was lent, in what sums, and at what times.

In *Lockwood v. Finn*, (13 How. Pr. Rep. 418,) Rosekrans, J. held that a statement that the indebtedness for goods, wares and merchandise sold and delivered by the plaintiff to the defendant, since a specified date, was insufficient, because it did not set forth what kind of goods, &c. were sold, nor how much, nor at what time. That it did not point to any particular transaction to which other creditors could direct their inquiries.

In *Beekman v. Kirk*, (15 How. Pr. Rep. 228,) Harris, J. held that a statement of indebtedness in a judgment recovered on a bond given for money borrowed by the defendant was defective, for want of disclosing the amount of the loan, or when the judgment was recovered. (See also 17 N. Y. Rep. 9.)

There are many other cases which might be cited of a similar character; but the above are amply sufficient to show that the views entertained by the judges in these cases, when applied to the present case, would condemn the statement as insufficient and defective. I will only add one more by the general term of this district. In *Davis v. Morris*, (21 Barb. 152,) Mitchell, P. J. held a statement of indebtedness for money lent and advanced at divers times by the plaintiff to the defendant, from 1853 to date, was insufficient.

These decisions, two of which are by the general term of this district, are controlling upon this question, notwithstanding there are some few cases of a contrary tenor by the judges at special term in other districts, such as *Post v. Coleman*, (9 How. Pr. Rep. 64.)

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The plaintiffs in this action were not the original creditors by whom the goods were sold, and it was suggested that less particularity was required from them than would be from the persons to whom the debt was originally due.

There is no distinction made in the statute, and there is no good reason shown for making any such distinction.

The statement is to be made by the debtor and not the creditor, and he can as well state the particulars in one case as in the other. He knows the particular transaction out of which the indebtedness arose, and he can state it as easily after the claim has been transferred to a third person, as he could before the transfer.

The motion to set aside the judgment as to the creditor making this motion must be granted.

[AT CHAMBERS, August 22, 1859. *Ingraham*, Justice.]

MERRITT vs. EARLE.

Judicial proceedings, on Sunday, are void, at common law; but all other business transactions on that day are valid, unless prohibited by statute. *Per* EMOTT, J.

A contract for work and labor, to be void, under our statute relative to the observance of Sunday, must be expressly and altogether for an act which the law forbids. It must be a contract for servile labor to be performed on Sunday exclusively and expressly, and not on any other day.

A contract for the transportation of property, upon a steamboat, is not void because made on Sunday; nor because the voyage is to commence, and does commence, on Sunday evening.

In an action against a carrier, for a breach of his duty as such, although negligence be averred, in the complaint, it is not necessary to show any positive misconduct, to sustain the averment.

Any act or omission of the carrier, or any thing which may befall his vessel and occasion danger to property, is regarded by the law as negligence, unless it be the act of God or the public enemies.

To sustain an action against a carrier for an omission to deliver property, it is sufficient that the property was received by the defendant's servants, on his vessel, for transportation, and that while he was engaged in transporting the same the property was lost, and not safely delivered.

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Upon these facts the carrier is liable, without any contract, and independent of any, unless the loss of the vessel was occasioned by the act of God.

Where the act of God is relied upon to excuse the carrier, it must be not only the sole, but the immediate, and not a remote cause of the loss.

A loss occasioned by an obstruction in a river, produced by mixed causes, and which is not the result of the operation of natural forces upon natural objects alone, as the shores or the bottom, is not, in a logical or a legal sense, the act of God.

Thus where a steamboat, carrying property for hire, was wrecked in the Hudson, by running upon the mast of a sunken vessel which had been capsized and sunk by a violent storm, a day or two before; it was held that the owner of the steamboat was liable for property lost by the sinking of the steamer.

A PPEAL from a judgment entered at a special term after a trial at the circuit.

Mr. Cardozo, for the appellant.

Robert H. Coles, for the respondent.

By the Court, EMOTT, J. This is an action against a common carrier. The complaint alleges that the defendant, on the first day of September, 1856, being then a common carrier between New York and Albany, by means of the steamboat Knickerbocker running on the Hudson river, undertook and agreed to transport two horses of the plaintiff from Albany to New York, and received them on board of his vessel. That the defendant did not safely transport the horses to New York, but on the passage down the steamboat was sunk by the negligence of those in charge of her, and the horses were lost. The answer denies the receipt or possession of the property by the defendant, and denies all negligence; averring that the loss of the vessel was occasioned by the act of God. The cause was tried before me at the Westchester circuit, when I directed a verdict for the plaintiff, reserving the defendant's exceptions to be heard in the first instance at general term; intending to fix the amount of the recovery, if the plaintiff was entitled to one, and to present to the court the questions involved, for more careful consideration. The par-

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ties have, for some reason, disregarded these directions; the plaintiff has entered judgment, and the defendant has appealed; but the legal questions involved are presented in the same manner as if the case were heard on the exceptions merely.

Upon consideration we think the plaintiff is entitled to recover. The case presents two questions. The first objection made by the defendant to the plaintiff's action was, that the contract for the transportation of this property was made and the property delivered on Sunday, and the voyage of the vessel was to be, and was, commenced on that day. The defendant was the owner of the steamboat Knickerbocker, which was at that time running regularly between New York and Albany; leaving New York for Albany on Monday, Wednesday and Friday in the afternoon, and Albany for New York on Tuesday, Thursday and Sunday in the afternoon, and arriving at her port of destination, each way, on the following morning. The plaintiff arrived in Albany with his horses, by rail road from the west, on the morning of Sunday, August 31; and having ascertained that the defendant's steamboat was to leave in the evening at six or seven o'clock, he put his horses on board in the afternoon, as he was directed to do by those in charge of the vessel, and took passage himself, when the vessel left. In the evening, while on the passage, he paid the freight of the horses at the office, on the boat, and took a receipt. While the boat was passing through the Highlands she ran upon the mast of a sunken sloop and was lost. This took place about two or three o'clock on Monday morning the first of September.

There are, it seems to us, a number of sufficient reasons why these transactions on Sunday do not constitute any objection to the liability of the defendant as a carrier. It must be remembered that all prohibitions of ordinary business on Sunday, with us, come from the statute. At the common law judicial proceedings, only, were prohibited on Sunday, which is said in the books to be *dies non juridicus*. Even this is not strictly on grounds of morality or of the

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Christian religion as recognized by the common law, nor was it the original practice of the Christian church. It was introduced, like very many other doctrines and practices, some of which are perhaps less commendable, into popular christianity and thence into common law and usage, by the influence of the clergy. It is well known to lawyers, at least, that until the year 500 the christian courts were open, and legal business transacted in the ordinary way on Sundays as on other days. In the year 517 a canon was made forbidding this practice; which canon was subsequently confirmed by an imperial constitution. It was received with other parts of the canon law by the Saxon kings of England, and afterwards ratified by William the Conqueror and Henry the 2d. Thus it comes that judicial proceedings on Sunday are void at common law. (*See 3 Burr. 1597; 8 Cowen, 27; Spelman's Orig. of Ten. ch. 3, p. 75.*) But all other business transactions are valid, except so far as prohibited by statute, however unbecoming or wrong in morals they may be considered. Our present statute (1 R. S. 675, 676) forbids traveling, except in specified cases, servile laboring or working, and the exposure to sale of any wares or merchandise, except certain articles of food at a particular hour of the day. These are unlawful acts by statute, and it may be conceded that a contract for doing them, or based upon them, would be void. Making a contract or agreement upon a Sunday, however, is not forbidden. Thus in *Boynston v. Page*, (13 Wend. 425,) a sale of a horse made on Sunday was upheld, and, in the opinion of Judge Sutherland, a number of cases are cited in which transactions on Sunday have been sanctioned. 2

If the liability of the defendant rested entirely on contract, he could not escape from it merely because the contract was made on Sunday. The contract was completed by the payment of the money and taking the defendant's receipt on the passage down. It was not however a contract for the performance of servile labor on Sunday, even if the business of the defendant is to be considered as coming within this term as

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used in the statute. It was simply an agreement for the transportation of the plaintiff's horses; and the defendant, if he had chosen to do so, might have detained his boat until midnight on Sunday before starting on his voyage, and yet have performed this agreement or any agreement under which the property was received on the vessel. It is true the vessel was advertised to leave on Sunday afternoon, but it is also true that the voyage would and could not be performed before Monday. If her departure on Sunday evening absolved her owners from all liability as carriers, the same principle would discharge the owners of vessels where voyages were completed on Sunday, leaving the port of departure on Saturday and arriving at their destination on Sunday morning. It would also be fatal to the responsibility of the owners of coasting and lake steamers and canal boats, and of the numerous sailing vessels on all our waters whose voyages regularly include a Sunday between their commencement and their conclusion. A rule which would lead to such results cannot easily be admitted. The true rule is that a contract, to be void by this law, must be expressly and altogether for an act which the law forbids: it must be a contract for servile labor to be performed on the Sunday exclusively and expressly, and not on any other day. Thus in *Watts v. Van Ness*, (1 *Hill*, 76,) the plaintiff had been allowed to recover a specific sum beyond his compensation for services on week days, for work as an office clerk, done on Sundays. The court set aside the report unless the amount of these charges were deducted. *Smith v. Wilcox* (25 *Barb.* 341) was an action for the price of an advertisement published in a Sunday paper, which, as the court say, is an article of merchandise distributed and sold only on Sunday. I apprehend that it would not be an objection to a recovery by the printer of a daily paper, for his paper or advertising in it, that he saw fit or was accustomed or even was compelled, in order to accomplish his publication properly, to do part of his printing or other work on Sunday.

But the liability of the defendant does not rest upon con-

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tract, but upon his duty as a carrier, as settled and fixed by custom and the common law. It is true the complaint states an undertaking and agreement, but it is one which the law imposes, without any express contract, and whose responsibilities are only diminished, and never increased, when a formal contract is made. So, too, in this complaint negligence is averred, but it is not necessary to show any positive misconduct to sustain such an averment. Any act or omission of the carrier, or any thing which may befall his vessel and occasion danger to property, is regarded by the law as negligence, unless it be the act of God or the public enemies. In *Allen v. Sewall* (2 Wend. 338) it was held, after full consideration, that the gravamen of an action against a carrier may be a breach of duty; that no undertaking need be relied upon, and the action is in character *ex delicto*. It was sufficient, therefore, to sustain this action, that the plaintiff's horses were received by the defendant's servants on his vessel, for transportation; that the defendant was thus transporting them to New York on Monday morning, September 1st, and that they were then lost and not safely delivered. Upon these facts the defendant is liable, without any contract and independent of it, as it did not vary the terms of his legal liability; unless the loss of the vessel was occasioned by the act of God.

The defendant's counsel requested the court to charge the jury that the fact that the loss was occasioned by an inevitable accident, against which the defendant could not have guarded by the exercise of due diligence and precaution, discharged the defendant. The instruction was properly refused, for it assumed that the defendant's servants were guilty of no negligence—a question which was at least open to doubt, and upon which the plaintiff was entitled to go to the jury if the case was to turn upon it. But as a verdict was directed for the plaintiff, without leaving any question to the jury, the defendant's exception to that direction will raise the question which he desires to present. Notwithstanding the language of some judges and writers of high authority, I think there is a dis-

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inction between "the act of God" and "inevitable accident." The reason and ground of the severe rule which the law holds as to common carriers, is not to compel the exercise of due diligence and caution, nor is that the measure of his responsibility. On the contrary there are risks, as was observed by Lord Mansfield, which no foresight of the carrier could avert, and losses which are not the consequence of any want of care or skill on his part, but which nevertheless he must make good. The law, for reasons of public policy, makes the carrier an insurer against all losses except such as are directly produced by divine interposition, or attacks by public foes. The rule is admitted to be severe, and to some extent arbitrary, but it has always been vindicated as founded in wisdom. See the observations of Lord Holt in *Coggs v. Bernard*, (2 *Ld. Raym.* 909,) and in *Lane v. Cotton*, (1 *id* 546;) of Ch. J. Best in *Riley v. Horne*, (5 *Bing.* 217,) and of Judge Bronson in *Holister v. Nowlen*, (19 *Wend.* 241.) The rule of a carrier's liability appears hard in other applications than to accidental losses or destruction. As Lord Holt observes in *Lane v. Cotton*, it seems hard that a poor carrier who is robbed on the road, without any manner of default in him, should be answerable for all the goods he takes. Yet it would be more intolerable if it were not so, for the danger and the temptation to combination and collusion with thieves and dishonest men. So in respect to losses by what might be called accidents and perils of the voyage, it must be observed that the carrier is intrusted absolutely with the goods he transports, and that very often, and it may be said generally, in the absence of their owner and of all human witnesses except himself or his servants. He therefore is held to insure them against every thing but two things, which, as Ch. J. Best remarks, it is supposed will be so well known to all the country where they happen that no person would be so rash as to attempt to prove that they had happened when they had not, viz. the act of God, and the public enemies. There is a phrase sometimes used in speaking of the liability of carriers, which is borrowed from

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the express exception commonly inserted in bills of lading—I mean the phrase, “perils of the sea.” But I apprehend it would not be safe to hold that this expression is synonymous with the act of God, or even with inevitable accident. Thus in *Smith v. Scott*, (4 Taunt. 126,) the term perils of the sea was held to apply to a case where the vessel was lost by being run down by another vessel, through the negligent management of the latter. The question has never perhaps been expressly determined in this state or in England, although a number of cases will be found collected and discussed in *Angell on Carriers*, § 166 *et seq.* and in *Story on Bailments*, § 512. The phrase would seem to import a danger resulting from the voyage, or the character of the transportation, and which the carrier could not have provided against by the exercise of all due care. The phrase “inevitable accident” goes a step farther, and applies to occurrences which no foresight or precaution of the carrier could prevent. But even this is not identical in meaning with the “act of God.” That is an expression which excludes all human agency. It signifies the direct act of a providential cause; for in a wider sense every thing is the act of God, since nothing happens but by his permission. In the case of the *Trent Proprietors v. Hood*, (4 Doug. 287,) Lord Mansfield laid down the distinction very expressly. That was a case of a loss by a vessel running on the anchor of another vessel which had no buoy to indicate its position. There was indeed an ingredient of negligence in the case, since they should have looked for the anchor, seeing the vessel. But Lord Mansfield observes, and the case is valuable for this, “The general principle is clear. The act of God is natural necessity, as winds and storms which arise from natural causes, and is distinct from inevitable accident.” In *Forward v. Pittard*, (1 T. R. 27,) the same judge defined the “act of God” to be something in opposition to the act of man; and added that the law presumes against the carrier, unless he shows it was done by such act as could not happen by the intervention of man, as storms, lightning and tempest. That was a strong case to

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excuse the carrier. He was a wagoner, and had received on a Thursday a quantity of hops to be transported to Andover. His day of going was Saturday, and before that time, and during the day on Friday, a fire broke out in a booth 100 yards distant from the booth where the defendant had deposited the hops, and burning violently, consumed the booth where the hops were, and the hops. All negligence in the defendant was negatived by the case made. Yet the plaintiff had judgment, although it was an accident which the carrier could not have foreseen nor prevented. It might strictly be called an inevitable accident, and indeed the court say that the fire arose from the act of some man, "and therefore the carrier was liable, inasmuch as he is liable for inevitable accident." These distinctions are clearly indicated and approved in Judge Cowen's opinion in the leading case of *McArthur v. Sears*, (21 Wend. 198,) and indeed what I have been saying is little more than a reiteration of that opinion.

That was as strong a case for the defendant as the present, and in some points resembling it. The vessel was lost in attempting to enter the port of Erie. The master knew that his course should range by the lights of two lighthouses. It was a dark night, snow falling, and a considerable wind. One of the beacons was not burning, through some neglect, and a light on board a steamer which had grounded in a previous gale of wind was easily mistaken for the beacon. This mistake occasioned the loss of the vessel, certainly without any fault of the mariner. And it may be added that the vessel whose lights deceived the master had been previously cast away by a violent gale, which might properly have been called the "act of God." In that respect the case resembles this, because here the sloop whose mast entered the steamer's bottom was sunk in a squall of wind, although not perhaps without fault in her crew. But it was held in *McArthur v. Sears* that there was too much admixture of human means to sustain the defense, under the rules of law. Another leading case which the present circumstances still more nearly resem-

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ble, is *Smith v. Shepherd*, reported in *Abbott on Shipping*, part 3, ch. 4, § 1. There the defendant's vessel was lost by striking a floating mast attached to a vessel which had been sunk by getting on a bank which had been suddenly and unexpectedly made dangerous by a great flood. The changing of the bank was conceded to be an act of God; but that alone was not the cause of the loss of the vessel of the present defendant. There must be added the sinking of the other vessel and the fastening the mast, and this brings in human agency. Judge Parsons defines the "act of God," as spoken of in the law of carriers, to be something which operates without any aid or interference from man; and the learned American editor of *Smith's Leading Cases*, in his note to the case of *Coggs v. Bernard*, holds the act of God to mean the extraordinary violence of nature. It is a corollary from these principles and the cases in which they are found, that if the act of God is to excuse the carrier, it must be not only the sole but the immediate and not a remote cause of the loss. This is strongly exemplified in the case of *Smith v. Shepherd*, to which I have just referred. The defendant's vessel was forced upon the bank by the mast attached to the sunken ship. That ship had sunk in consequence of the alteration of the bank by a sudden flood, and the defendant's ship was wrecked for the same reason. The bank, in the condition in which it was before the flood, was safe for vessels to ground and lie upon. But it had become so steep and shelving that, upon the tide falling, the vessel's stern went off into deep water and she filled. There was no question of negligence, for evidence that the defendant used all possible care was offered at the trial and rejected. The flood by which the bank was changed was the ultimate occasion of the calamity, but it was held to be too remote. The defendant's vessel was not driven on the bank by natural violence, or without the interference of human agency. She came in contact with a floating spar which human agency had attached to the sunken vessel, and that was the immediate cause of her loss.

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In the case at bar, it appears that on Friday before this occurrence, a sudden and violent squall overtook a number of vessels in this part of the Highlands, and one of the number not being able or ready to shorten sail with sufficient alacrity, was capsized and sunk. The defendant's steamer ran upon the mast of this sunken vessel, which stove in her bottom, and she was cast away in consequence. The immediate cause, therefore, of the loss of the defendant's vessel, was her running upon this mast. She was not forced upon it by the wind or current; and although the wind which was the occasion of the sinking of the sloop was a natural force, and operated upon the sloop without any intervention of human means, yet that was but the remote cause of the steamer's loss. To produce this there must have been added the placing the sloop in the position in which she was overtaken by the wind. The wind was the act of God; but that did not sink and would not have sunk the steamer. The sailing the sloop over that particular part of the river was the act of man, and without that, the defendant's steamboat would have sustained no harm. It was necessary that both these conditions should concur to cause the loss of the defendant's vessel. A loss occasioned by an obstruction in a river thus produced by mixed causes, and which is not the result of the operation of natural forces upon natural objects alone, as the shores or the bottom, is not, in a logical or a legal sense, the act of God. It may be inevitable by human care and skill, but it is not the consequence of agencies which are and were controlled by divine will and power alone.

We are of opinion that the defendant is liable, upon the settled rule of the responsibility of carriers, and therefore the judgment from which he has appealed must be affirmed.

[KINGS GENERAL TERM, December 12, 1859. *Lott, Emott and Brown, Justices.*]

YOUNGS and others *vs.* RANSOM and YOUNGS.

It is not a ground of objection to the calling or settling of an individual as rector of a Protestant Episcopal parish, that his salary was not fixed by a vote of the congregation, according to section 8 of the act to provide for the incorporation of religious societies.

That provision of the statute has no application to congregations of that denomination.

If a vestry possess the power to settle a minister and fix his salary, a call, made by the wardens and a majority of the vestry addressing a written invitation to an individual to become their rector, and fixing his salary, followed by acceptance, and by mutual action and acknowledgment of its validity and of the relation thus created, cannot afterwards be disregarded or denied.

A call to a parish, and its acceptance and a consequent entry upon the duties of the office of its minister, are all which we have, in this country, resembling the presentation, admission and induction of the English church; and neither these terms, nor the ceremonies indicated, are known to our law as applicable to any of our churches.

The congregation, in the manner indicated by the law of the land, and, in the case of Episcopal churches, by their vestry, call a clergyman to exercise his functions in their parish, and fix his compensation. If he accepts the call and enters upon his office, there is no ceremony which is required or can be performed, to add force or efficacy to these mutual acts, unless it be by reason of some special requirement of the discipline of a particular church. "Induction," in the sense in which it is used in English ecclesiastical law, cannot be employed here.

If every other requisite for the due and proper settlement of an individual as rector of a parish is complied with, the absence of the ceremony of "institution" will not prevent his being such; unless that is the positive rule of the ecclesiastical body to which he and they belong.

There is no such thing known to our law, as institution or induction; and the ecclesiastical law of England is no part of the law under which we live.

The effect or necessity of what is called "institution," depends upon the customs and regulations of the Episcopal church; and is therefore a question of fact, and not of law.

Before our courts can take notice of the customs of a particular denomination or body of christians, or their nature or effect, or of any rights or disabilities resulting from their observance or neglect, the existence of the customs must be properly averred, and proved, as matter of fact.

When a minister is called to, and settled in the charge of, an Episcopal parish, unless something to the contrary is distinctly expressed in the call and settlement, he cannot be dismissed without his consent, except by the bishop of the diocese.

The rule or regimen of the Episcopal church, as to the tenure of its parish

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ministers, is, that when they have once been placed in charge of congregations, they can neither leave nor be dismissed, except by mutual consent, without the intervention of the bishop. *Per* EMOTT, J.

A court of equity will not interfere by injunction to eject a clergyman from his possession of the church and to forbid his preaching in it, where he is in office, placed there originally by the act of the parish, and claiming to be rightfully there, and there is no other person claiming the office, or with whose rights as a minister of the parish the defendant is interfering; and where there is no occasion for a breach of the peace, or a conflict between two clergymen or their adherents, in conducting the worship of the congregation.

APPEALS by the plaintiffs from three orders made at a special term. The facts appear in the opinion of the court.

By the Court, EMOTT, J. The defendant Ransom is a minister of the Protestant Episcopal church, and is in the actual discharge of his functions in the parish of Christ Church, Oyster Bay, claiming to be the rector. The other defendant, Youngs, was treasurer of the corporation in 1858, and claims that he still holds the office, in consequence of the alleged invalidity of the election of a successor, which was made in the year 1859, at a meeting of the vestry, which the rector refused to attend. The action is brought by the plaintiffs, who are the wardens and vestrymen of the parish, for an injunction to prevent the defendant Ransom from officiating in the church, from interfering with the vestry in the control or use of the church, from erasing, destroying or concealing the parish register, and from receiving any money from the defendant Youngs, as treasurer of the parish; for a similar injunction to prevent the defendant Youngs from aiding the defendant Ransom in officiating or acting as rector, and from interfering with the plaintiffs, or paying any money to Ransom out of the funds of the parish. The complaint also asks for a judgment directing the defendant Youngs to surrender his office to his successor, and to deliver to him all books and moneys in his hands.

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The acts which are alleged in the complaint to be done or threatened by the defendant Ransom, are his refusing to leave the parish, claiming and threatening to be and continue to act as rector, insisting that neither the last annual election nor the subsequent vestry meetings were legal or valid, in consequence of his absence, and because certain persons who participated had ceased to be members of the church or parish, and his erasing the names of sundry such persons from the list of communicants in the parish register. It is alleged that the defendant Youngs refuses to render an account, or deliver the books and papers of the church to the person appointed in his place by the plaintiffs; that he has sued the sexton for collections in his hands; and that he threatens to continue to act as treasurer, and to pay to the defendant Ransom his salary. And both defendants are charged with assuming to rent, and with having rented, certain pews in the church.

The ground upon which Mr. Youngs' right to act as treasurer is denied has already been indicated. The reasons for which it is contended that Mr. Ransom is not the rector, appear from the complaint to be that he was not regularly called; that his salary has never been fixed by a vote of the congregation; that he has never been "instituted" or "inducted;" that he has been dismissed, and finally, that he has resigned.

Upon the complaint, together with voluminous affidavits which accompanied it, a temporary injunction was granted by the county judge of Queens county. By the injunction the defendant Joseph Ransom was forbidden to officiate in the church, to interfere with the wardens and vestry in its use, and to erase or mutilate the parish register or any other book or property of the church. The defendant Youngs was forbidden to aid Mr. Ransom in so officiating, and both defendants were forbidden to let pews, or collect rents or revenues. This injunction was granted on the 9th of July, 1859. The defendants put in an answer and gave notice of a motion, for the August special term in Kings county, to dissolve the injunction. Subsequently, on the 18th of July, the defendants

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obtained from the county judge, *ex parte*, a modification of the injunction, so that the defendant Ransom was permitted to use and officiate in the church until the first of August, when the motion to dissolve the injunction could be heard. After this the plaintiffs applied to one of the justices of this court, *ex parte*, and obtained an order suspending the modification of the original injunction until the farther order of the court, and directing the defendants to show cause, on the first Monday in August, why it should not be vacated.

The defendants, under the advice of their counsel, disregarded this order and opened and held service in the church, as they were allowed to do by the county judge's order modifying his injunction. The plaintiffs then moved for an attachment against the defendants for so doing, and also to set aside the last order of the county judge, and the defendants moved to dissolve the injunction. Both motions of the plaintiffs were denied, and the defendants' motion to dissolve the injunction granted. The plaintiffs have appealed from each order.

There is no material dispute in regard to the facts. In January, 1852, a call or invitation to become rector of the parish was made to Mr. Ransom, in writing, signed by the wardens and a majority of the vestry, fixing the salary at \$500, which was subsequently increased by a vote of the vestry to \$600. During the same month this was accepted, in writing, and soon afterwards Mr. Ransom moved to Oyster Bay and entered upon the discharge of the duties of rector or minister in the parish. He has acted as rector in every particular until the present controversy arose; his election was certified to the convention of the diocese of New York in September, 1852, and he took his seat in the convention, by virtue of that certificate, and has since held it. The call does not appear to have been made by a formal vote of the vestry as a body, but by their signing the paper already referred to. But the proceeding was subsequently ratified by the vestry, by recording the acceptance, if not the call, upon their minutes, and by recognizing the defendant as their presiding officer and

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the rector of the parish, and by fixing his salary as such. There can be no doubt that if a vestry possess the power to settle a minister and fix his salary, a call made by such a body in this manner, followed by mutual action and acknowledgment of its validity and of the relation thus created, could not afterwards be disregarded or denied.

It was strenuously insisted that the defendant Ransom was not duly called or settled as the rector of this parish, because his salary was not fixed by a vote of the congregation, according to section 8 of the act to provide for the incorporation of religious societies, which it is contended is applicable as well to Episcopal as to other churches and societies. This question came before Vice Chancellor McCoun in the case of *Humbert v. St. Stephen's Church*, (1 *Edw. Ch. Rep.* 308,) and was carefully considered by him. We fully concur in his reasoning and its result, and we can add nothing to what he has said, except that the uniform practice of Episcopalian churches confirms the correctness of the conclusion that the provision of the statute now in question has no application to congregations of that denomination. It was supposed by the plaintiffs' counsel that this case was overruled by the judgment of the court of appeals in *Robertson v. Bullions*, (1 *Kern.* 243.) But this is altogether a mistake. The questions discussed in that case related to the power of a society or congregation to change their church relation, their doctrine, discipline or worship at the pleasure of a majority, by a vote legally taken and expressed. But this has no bearing upon the question whether the sections of the statute now in question, which were evidently framed for societies of the Presbyterian or other churches, are applicable to those which are organized as Episcopal churches, and continue such. It is no doubt in the power of a majority of the corporators of this parish, if they so determine, to convert their church and society into a Presbyterian, a Baptist or a Methodist church, without forfeiting the property held by the corporate body. But as long as they continue an Episcopal church, their officers and people possess the pow-

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ers and are under the restrictions which the statute imposes upon that class of corporations and no others. What these powers are, depends upon the construction and application of these statutes, and with this the case of *Robertson v. Bullions* has nothing to do.

It is said that Mr. Ransom is not the rector of this parish, because he has never been "instituted" nor "inducted." Both these terms are used in various canons &c. of the Episcopal church in this country, without always an apparent attention to the difference in their meaning in the country from which they are derived. In England the parson of a parish, which Blackstone says is the most legal and most honorable appellation a parish minister can have, or the incumbent of any benefice, upon being fully admitted thereto, acquires legal rights as well as prerogatives of a merely clerical character. The acquisition of the full legal title to a benefice in the English church involves several particulars. The patron must present to the living, the ordinary must examine and admit the clerk presented, and then follow institution and induction. Admission to a benefice, in a general sense, includes institution, but strictly it is the approval of the presentee by the bishop; while institution is the act by which the latter commits to him the cure of the church. Institution more properly refers to the cure of souls, and does not confer upon the clerk a legal title to the glebe, the tithes, or any of the temporalities of the living. (*Burn's Eccl. Law*, I, 153, 154.) To this, induction is necessary, which is a separate ceremony, performed under the mandate of the ordinary, by the archdeacon or other person to whom it is addressed. By this the clerk becomes fully possessed of all the profits of the living and of all his rights as the incumbent. In England, institution and induction are both short and simple ceremonies, and seem to be used rather for the sake of legal strictness and notoriety, somewhat as livery of seisin was made upon a feoffment, than for any supposed spiritual significance. A call to a parish, and its acceptance and consequent entry upon the duties of

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the office of its minister, are all which we have in this country resembling the presentation, admission and induction of the English church; and neither these terms nor the ceremonies indicated are known to our law as applicable to any of our churches. The congregation, in the manner indicated by the law of the land, and in the case of Episcopal churches by their vestry, call a clergyman to exercise his functions in their parish, and fix his compensation. If he accepts the call and enters upon his office, there is no ceremony which is required or can be performed to add force or efficacy to these mutual acts, unless it be by reason of some special requirement of the discipline of a particular church. That induction, in the sense in which it is used in English ecclesiastical law, cannot be required or employed here, is sufficiently obvious from a consideration of the different position and rights of clergymen in the two countries. In England, the parson as such has a freehold estate in the glebe, the tithes and other dues of the parish. By induction, he becomes fully invested with these and with the right to sue for and demand them; but in this country there are no such rights or interests into which a clergyman can be inducted. The property of the church, its revenues, its glebe, its parsonage if it have any, its church edifice and the like, belong to the corporation, and the clergyman has no rights or estate in any of them, other than such as are conferred by express contract, except perhaps the control and possession of the church during divine service, as long as the building is retained by the society for that purpose, although even this would rather seem to appertain to the vestry. It is very manifest that the term induction is out of place in this state, at least in any discussion of legal rights.

Similar observations may be made upon the use of the term rector. This appellation has a special meaning in the English church, which has little, if any, bearing upon any prerogatives which the rectors of our parishes claim or possess. If the interpretation of this title, or the inference from its use, contended for by the plaintiffs, be correct, the difference between a rector

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and a minister in an Episcopal parish, in this country, would be, that the former is instituted and settled for life, while the latter is removable at the will of the vestry or congregation. Even if this were so, the latter, until removed, would seem to possess all the powers, as he discharges all the functions of the former; and the term rector would be inappropriately applied or refused, according to a difference merely in the term of the office. The truth is that the style rector, although not a remarkably apposite appellation in this country, was probably adopted in the Episcopal church, because the position of their clergy, who are not the substitutes of other incumbents and are directly entitled to the income attached to their places, more nearly resembles that of the rectors in the English church than that of any other class of its clergy. A rector, in England, is the parson of a parish, where tithes are neither appropriate, that is, belonging to some corporation, nor inappropriate, that is, belonging to or granted to some person by the crown, to which a large number of the livings which had been acquired or appropriated by the religious houses were confiscated at the reformation. A very large proportion of the parochial clergy of England, I mean those permanently entitled to benefices, are not rectors, but either vicars or perpetual curates. These are legally and really deputies of the person to whom the revenues of the parish belong, and who is bound, by their receipt, to provide for the maintenance of divine service therein. Their compensation is matter of grant or agreement, or fixed by prescription at a certain proportion of the tithes which by law belong to the appropriator. In the case of a rector he is under no appropriator, but is himself of right entitled to all the revenues of the parish—tithes, dues, or whatever they may be. As in this country of course there is no appropriation of benefices or parochial revenues, the parish clergy may in that sense all be styled rectors, and for this reason probably were so. The title, however, when traced back to its origin and true import, affords no light upon the present question.

But it is insisted that there is a ceremony required in the

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Episcopal church before a clergyman can be permanently settled in a parish as its rector—that is, its permanent officiating minister. This ceremony is what is called in the common prayer book of the Episcopal church, “institution.”

The term “Institution,” in English ecclesiastical law, is applied to the investiture of the spiritual, as induction is to that of the temporal part of the benefice. (1 *Black. Com.* 391.) In the canons or rules of the American Episcopal church it refers to the particular ceremony which I have just mentioned, for which a service is provided in the Book of Common Prayer of that church. The plaintiffs insist that the defendant Ransom is not the rector of the parish, but is merely preaching there until it is the will of the vestry to discharge him, because this service has never been performed in his case in respect to this parish. This is a question which must be decided entirely by the rules and customs of this particular church or denomination. As there is no such thing as induction into the temporalities of the church, and as institution is merely a ceremony by which the charge of souls in a particular parish is committed to a minister with such form and solemnity as is considered appropriate, it does not follow from the nature of the case, and can only result from positive and express rule, canon or custom of this church, if the performance of this service is necessary to give to the incumbent of a parish that tenure which such a custom or rule establishes for its clergy in general. In other words, if every other requisite for the due and proper settlement of the defendant as rector of the parish was complied with, the absence of this ceremony will not prevent his being such, unless that is the positive rule of the ecclesiastical body to which he and they belong.

I have looked into the canons which are cited in Judge Hoffman's learned and laborious work upon the government of this church, and into his commentary upon them, and the practice under them, without finding any reason to adopt such a conclusion. Mr. Hoffman himself expresses very strongly an opposite opinion, (*Hoffman's Church Law*, 291, 293,) and he

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is very high authority upon such questions. I shall not go into any detailed examination of the legislation of the Episcopal church in this particular. Upon a careful consideration of Judge Hoffman's argument and of his authorities, I entirely concur in his views of the effect of the use or neglect of this particular service. It is not necessary for the purposes of this case, however, to consider the question in so broad an aspect as he has discussed it.

The only question now before us is the term or tenure of the defendant's office in the parish. This depended upon the contract between him and the parish which was contained in their call or offer and his acceptance, if that contract was specific upon the point, and upon the general rule of the church if the contract was silent. The contract, as evidenced by the call and acceptance, and the subsequent action of the vestry, including their certificate to the bishop or standing committee, contains no specification upon this point. Mr. Ransom was not called, nor did he agree to preach to this church for a year, or any specified time, nor at the will of the church or vestry. He was called to take charge of the parish as rector, and settled as such. It is not and cannot be denied, that the rule or regimen of the Episcopal church, as to the tenure of its parish ministers, is, that when they have once been placed in charge of congregations, they can neither leave nor be dismissed, except by mutual consent, without the intervention of the bishop. Without discussing the power to make, or the propriety of, agreements for the performance of clerical service limited in time, I think it is very clear that when a minister is called or settled in an Episcopal parish without any such limitation, he can only be dismissed, or sever the connection, by mutual consent, or by superior ecclesiastical authority, on the application of one of the parties. The 33d canon of the general convention of 1832 (*see Hoffman's Law of the Church*, 331) is very explicit to this effect. It applies to the case of a minister who is regularly instituted or settled, leaving it to the law or usage of the particular diocese to determine whether any thing

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more than settlement shall be required. It is said that the only penalty inflicted upon a congregation for a violation of the canon, is deprivation of its representation in the convention. But this is the only penalty in the power of the convention enacting the canon: the parties must go elsewhere for other remedies or punishments. It is stated in the answer, and such is no doubt the fact, that in the diocese of New York the institution office is seldom observed; and this destroys the effect of some parts of the canon upon this question. The cause of this neglect is not very material; but I apprehend it is a dislike of the form prescribed, or a dislike of the use of any such ceremony, if not absolutely required, which has led to its disuse, and not an opinion that its use will alter the relation between the incumbent and his parish, or the bishop. I have no hesitation in the conclusion, that when a minister is called to and settled in the charge of a parish, unless something to the contrary is distinctly expressed in the call and settlement, he can only be dismissed without his consent by the bishop of the diocese.

The observations which have now been made, dispose of the allegation that the defendant was dismissed from his parish. For after the defendant had been called and settled without any expressed limitation of time, he could not, according to the rules of this church, be dismissed or removed without his own consent, except by the bishop of the diocese. The allegation of a resignation of the church by the defendant may be very briefly disposed of. There is nothing proved in the case which amounted to more than an expression of an intention on the part of Mr. Ransom to resign at some future time. There is no actual resignation *in presenti*, and the unsuccessful attempts of both parties to this unhappy dispute to obtain the assistance or interference of the bishop, show that no such act was intended or understood.

It should be observed, with regard to the questions which now have been considered, that the question of the necessity or effect of what is called induction or institution in the Epis-

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copal church can hardly be said to be properly or at least necessarily before us on these papers. The right of the vestry of an Episcopal church to call a minister and fix his salary, and the validity of the defendant's call and settlement, depend upon the application and construction of the statute for the incorporation of religious societies, and are directly before us upon the facts stated. The question of the defendant's dismissal depends upon the character and validity of his settlement in the parish. The allegation that he had resigned is to be tested by an examination of the communications between him and the parish. But the effect or necessity of what is called institution, is purely a question of the customs and regulations of this particular denomination or body of christians. It is therefore a question of fact and not of law. There is no such thing known to our law as institution or induction, and the ecclesiastical law of the mother country is no part of the law under which we live. Before our courts can take notice of such customs, or their nature or effect, their existence should be properly averred and proved as matter of fact. The canons, rubrics or rules of this or any other church among us, are not laws; they are merely regulations for the conduct of its ministers and members, depending for their force upon the vows of the one and the consciences of the other, so far as they are within the limits of the rightful powers of such bodies. We know nothing of them judicially. It is a fatal objection to this part of the plaintiffs' case, that neither the complaint nor the affidavits which accompanied it contain the necessary allegations upon this point. The complaint merely states that the defendant Ransom was never inducted or instituted, and the affidavits do not add any thing to the complaint in this particular. There is no statement of what induction or institution is, for what purpose it is used, or to what extent it is considered necessary in the Episcopal church, what is its effect, or how it is performed. Without such statements of the rules or customs of the Episcopal church, we cannot take notice of

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their existence, or of any rights or disabilities which might result from their observance or neglect.

We are also of opinion that this preliminary injunction ought not to have been granted upon the statements of the complaint, against the defendant Ransom, even had the plaintiff been correct in his views of the rights of the defendants. Injunctions have been sometimes granted to stay the acquisition of, or entrance upon, an ecclesiastical office or its profits, by a person not entitled to it, or not lawfully elected or appointed to it. The case of *Humbert v. St. Stephen's Church*, (1 *Edw. Ch. R.* 308,) already cited, was a case of this sort. There are also instances in the English courts. (*Ambl.* 98. 1 *Dickens*, 146.) But these cases are not analogous to the one before us. The defendant is in office, placed there originally by the act of the parish, and claiming to be rightfully there. There is no other person claiming the office, or with whose rights as a minister of the parish he is interfering. There is no occasion for a breach of the peace, or a conflict between two clergymen or their adherents in the conduct of the worship of the congregation. The object of our interference is in effect to eject the defendant from his possession of the church and to forbid his preaching in it. We cannot find any precedent for such an interference. His preaching does not establish a right to his compensation or salary, if the plaintiffs are right in asserting that his connection with the parish has been terminated. We cannot discover that it infringes any other legal rights of the plaintiffs or the church, and it is not, certainly, in itself an act which should be forbidden by the injunction of a civil court.

With respect to the renting of pews or collection of rents, there is no allegation in the complaint that either of the defendants is irresponsible, or unable to respond for any moneys belonging to the church which may come to their hands in that way. An ordinary action at law would afford all the redress which is requisite for such a misappropriation of the funds of the corporation. The charge of mutilating the records of the

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church relates only to the record of certain persons being communicants in the parish, which does not confer or affect any civil rights whatever, and is therefore unlike the case of a record of marriage, or the like. With respect to the case against the defendant Youngs, there may perhaps be more color for the action, in the complaint, but its equities are fully denied by his answer.

We are of opinion that the injunction was properly dissolved, and that the order vacating it should be affirmed with costs.

We also agree with the opinions expressed by the judge at special term in regard to the motion for an attachment against the defendants, and the order of the county judge modifying his injunction. It is not necessary to discuss these questions at length, as we could add nothing to the views expressed by him. These orders are also affirmed with costs.

KINGS GENERAL TERM, December 12, 1869. *Lott, Enoott and Brown, Justices.*]

METCALF and DUNCAN *vs.* STRYKER.

Where a defendant is arrested by the sheriff, upon an order of arrest, and gives bail and is thereupon discharged from custody, but the bail do not justify, the sheriff himself becomes bail, and is liable in the same manner, and to the same extent, as bail to the action would have been, had such bail been given and perfected.

Hence, if the plaintiff obtains a judgment in the action, and an execution issued thereon, against the property of the defendant, is returned unsatisfied, and an execution against the body is returned *non est*, the sheriff is liable to pay the amount of such judgment, with interest.

The sheriff's liability being fixed by the original judgment, evidence of the insolvency of the judgment debtor is immaterial, in an action to enforce that liability, and should be rejected.

THE facts in this case are sufficiently set forth in the opinion of the court.

Mr. Goodrich, for the plaintiff.

Mr. Dikeman, for the defendant.

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By the Court, EMOTT, J. The radical fault of the argument for the defendant in this case is, that it treats the action as if it were brought for an escape, or a negligent or willful breach of duty by the sheriff. There may be some color given to this view by some of the allegations in the complaint, but the liability does not rest upon such a foundation. His liability is that of bail to the action, which is cast upon him in circumstances like the present, by § 201 of the code of procedure.

It appeared upon the trial of this cause at the circuit, that the plaintiffs commenced an action in this court against one George C. Harriman, and obtained an order of arrest, which was delivered to the defendant, then sheriff of Kings county, on or about August 15th, 1857. The defendant arrested Harriman, pursuant to this order, and held him in custody until he gave bail. On the 20th of August an undertaking was executed by three sureties, on his behalf, pursuant to section 187 of the code, except that the bail did not state their occupations, and thereupon the sheriff discharged him from custody. On the 25th of August, the sheriff served a copy of the undertaking upon the attorneys for the plaintiff in that action. The next day, i. e. the 26th of August, the plaintiff's attorneys gave the sheriff notice that the bail was not accepted. The bail did not justify, nor was any notice of justification served, and no new bail was given, but the action proceeded to judgment, and the plaintiffs recovered, in August, 1858, \$3743.77 of Harriman. A transcript was filed in the county of Kings and an execution against property issued to the sheriff of that county, which was returned unsatisfied. Then an execution against the body of the defendant was issued, and that also was returned that he could not be found.

It was conceded on the trial, as it also was upon the argument, that the defendant was liable, but the question is what is the extent and measure of his liability. After the plaintiffs had rested, at the trial, the defendant's counsel offered to prove that George C. Harriman, at the time of his arrest, was insolvent, and had no property not exempt from execution, and

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had ever since remained in the same condition. The judge rejected the evidence, and the defendant's counsel excepted, and thereupon a verdict was taken for the plaintiffs, by the direction of the court, for the amount of the judgment against Harriman with interest; the defendant's counsel also excepting to such direction.

Section 201 of the code enacts that in such a case as this, that is, where, after the defendant is arrested, his bail is not justified, the sheriff himself shall be liable as bail. The next section (202) provides for the enforcement of the sheriff's liability as bail, by prosecuting his official bond when a judgment has been recovered against him upon such liability and an execution thereon returned unsatisfied. And the 203d section makes the bail taken upon the arrest, when they do not justify, liable to the sheriff for all damages which he may sustain by their omission. Thus the three sections together impose upon the sheriff a liability in a given case, provide for its enforcement, and then for his protection or indemnity by the bail whom he has accepted. It is plain enough that in the case we are considering, the defendant became liable in the same manner and to the same extent as bail to the action would have been if such bail had been given and perfected. Thus the inquiry is reduced to the question, what is the liability of bail under the code, in such a case as the present?

The code itself furnishes no answer to this question, and the undertaking which is substituted for the bail bond of the old practice is no more explicit in this respect than the latter. The bail agree, in this undertaking, that the defendant shall at all times render himself amenable to the process of the court during the pendency of the action, and to such as may be issued to enforce the judgment therein. In the present case the code cast this undertaking upon the sheriff, and his undertaking was forfeited, inasmuch as the defendant in that action was not amenable to the process issued to enforce the judgment, and the execution issued against his body was returned "not found." But neither the undertaking nor the

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code inform us what is to be the consequence or the extent of the penalty incurred. We must therefore resort to the former practice of the courts, and the former legislation of the state, to assist our investigation. We are justified in this resort by section 276 of the code, declaring that in all actions for damages the recovery shall be at the same rate as might have heretofore been recovered, if that section be applicable to the present action, which I very much doubt; but we are justified by the sheer necessity of the case, if it be not. In the multiplied questions growing out of the code of procedure with which the courts are continually vexed, they would often be entirely at sea if they did not act upon their own knowledge of the previous law, and also presume, with a distinguished judge of our highest court in a famous case, that the authors of the code had some knowledge of what the law and the practice was, and acted upon it.

It must not be forgotten that this is not an action for a neglect of duty by the sheriff, as for instance in not returning an execution, or otherwise. These would have been actions on the case, before the code destroyed our nomenclature. The plaintiff in such actions recovered *damages*, of which the amount of the judgment was the measure, *prima facie*, but subject to be mitigated in certain circumstances. (*The Bank of Rome v. Curtiss*, (1 Hill, 275,) and *Pardee v. Robertson*, (6 id. 550,) are instances of this class of actions under the former practice; in the latter of which Judge Cowen traces the history of the then existing mode of procedure. So, under the present system, *Humphrey v. Hathorn*, (24 Barb. 278,) and *Ledyard v. Jones*, (3 Seld. 550,) are cases in which the same rule of damages observed under the former practice was applied. Neither of these cases is parallel to the present. Nor can we strictly or properly consider this an action for an escape, or to be determined by the rules which have been applied to such cases. If the undertaking given on behalf of the defendant Harriman in the original action, which was accepted by the present defendant, and upon which he discharged

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his prisoner, was not in conformity to the requisitions of the statute, which seems to have been the case, then it would seem that Harriman's discharge was an escape, for which the defendant was liable. It is, however, unnecessary to determine whether this was so, or what would be the sheriff's liability in consequence, since that is not the ground of the present action. If an action had been brought forthwith upon such discharge, for an escape from mesne process, the rule of damages would have been different from what we understand it to be now. But the defendant's liability was fixed by the failure of Harriman's bail to justify; and that liability was the same, whether the undertaking were or were not in conformity to the statute. That question, and the extent of the sheriff's liability for an escape, may be passed over. They are not the points now before us.

Still it may be observed that there is an analogy between actions for escapes and actions upon bail bonds. It was well settled, under the law before the code, that in an action for an escape from final process the plaintiff recovered the amount of the original judgment, while for an escape from mesne process he could recover only his actual damages. In the former class of cases, therefore, that is where the defendant was actually charged in execution, the action was debt, while in the latter it was case. See, to this effect, *Rawson v. Dole*, (2 John, 454;) *Potter v. Lansing*, (1 id. 215;) *Russell v. Turner*, (7 id. 189;) *Patterson v. Westervelt*, (17 Wend. 543.) See also *Van Slyck v. Hogeboom*, (6 John. 270,) in which the distinction between the two classes of actions is clearly defined, *Kellogg v. Manro* (9 John. 300) was a suit upon a bond given for jail liberties, and although brought after judgment, it was in effect for an escape from mesne process. The defendant had been in custody on mesne process, was surrendered by his bail, and was thereupon admitted to the liberties, and no execution was proved.

We were also referred, upon the argument, by the defendant's counsel, to the provision of the revised statutes in rela-

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tion to bonds for the jail liberties, and suits thereon. (2 *R. S.* 433 *et seq.*) But the liability of the bail to the action, under the code, is not the same with that of the bail given for the limits. The bond for the jail liberties may be given either before or after judgment, when the defendant is held either on mesne or final process, and its effect is varied accordingly. If it be given for his discharge from mesne process or upon his surrender by his bail, on such process, then the liability of the bail extends only to the actual loss sustained by the plaintiff, as the liability of the sheriff for an escape from mesne process is limited to the actual damage. But if the prisoner was held by an execution, then his bail to the jail liberties must pay the judgment, if he commits a breach of the bond.

In all these cases the bail who undertake that their principal shall be amenable to final process were held to pay the amount of his debt if he was not, and the sheriff who suffers an escape from final process is held to the same liability.

Now it is very true that the undertaking given for Harri-man, the place of which was taken by the sheriff, was given upon an arrest on mesne process. But it was not merely bail upon an arrest, nor was it bail for the jail liberties; it was bail to the action, and to the same effect as special bail under the former practice. The liability of the bail in such an undertaking, and the consequent liability of the sheriff in the present case, continues through the whole course of the action. It varies with the several stages of the cause, and its ultimate extent is not determined until judgment is recovered and all the remedies upon it exhausted against the principal. It may be terminated at any time by the surrender of the principal by his bail, before judgment or after it, or even after suit upon the original undertaking. The sheriff possesses the same power to surrender the defendant after he has become substituted as his bail by the failure of the latter to justify. (*Buckman v. Carnley*, (9 *How. Prac. Rep.* 180.) Unless, however, such a surrender is made, the liability of the bail continues upon the undertaking, and, after judgment and ex-

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ecution, is limited only by the amount of the judgment against the principal.

We can see no escape from the conclusion that the sheriff in the present case incurred the liability of bail to the action; that this suit is properly brought upon this liability; that if this had been an action against the bail in an undertaking which had been accepted or had been justified, the recovery must have been the full amount of the original judgment and interest; and that therefore the present defendant was liable to the same extent. As soon as we determine that the liability of the sheriff is that of bail, and the present action is brought against him as in effect made bail by the statute, and not for negligence, or an escape, it must be seen that these consequences are inevitable. If it were otherwise, the provisions of the code as to arrest and bail would be rendered entirely nugatory. We cannot apply any rule to the liability of the present defendant which will not also be applicable to that of the sureties in the undertaking of bail when perfected. Whatever will exonerate the sheriff, or mitigate the recovery against him, must have the same effect in cases where they are sued. The result is that we are asked by the defendant's counsel to hold that whenever a defendant who has been arrested is insolvent, which may sometimes be the very reason of his arrest, if not its cause, his bail are absolved from all responsibility except for nominal damages. If that were the law, the only persons whose arrest would be of any avail would be those whose arrest is altogether unnecessary. The law, previous to the code, was guilty of no such absurdity; and as the present statute neither alters nor declares the rule, we are not at liberty to impute such consequences to it. As the defendant's liability was therefore fixed by the original judgment, evidence of the insolvency of the judgment debtor was immaterial, and was properly rejected. The direction given to the jury was correct, and judgment must be ordered for the plaintiff upon the verdict, with costs.

[KINGS GENERAL TERM, Dec'r 12, 1859. *Lott, Emott and Brown*, Justices.]

McGIFFERT vs. McGIFFERT.

Where a man, being a resident of this state, and having a wife who also resides here, goes to another state and in a suit brought there obtains a decree of divorce against his wife, without any service of process upon, or notice to, her, or any appearance by her, such decree is void, and unavailing for any purpose whatever.

THE complaint in this cause was filed by a wife against the defendant, her husband, for a divorce *a vinculo matrimonii*. The parties being residents of this state, were married here on the 12th of September, 1856. They lived together but a few weeks, and then separated. In January, 1851, the defendant filed his complaint against the plaintiff, claiming to have the marriage annulled, on the alleged ground of the physical incapacity of the plaintiff to consummate the marriage. This she denied, in her answer. On the 28th of April, 1851, an order was made in that cause, requiring the plaintiff therein to pay court fees and alimony to the defendant in that cause; and the same not having been paid, an order was made in that action, on the 16th of October, 1851, staying all proceedings on the part of the plaintiff therein until paid, and the proceedings therein were stayed and suspended. In January, 1852, the defendant went to the state of Indiana, leaving the plaintiff, his wife, in this state, where she has ever since remained. The defendant stated, in his answer, that such residence in Indiana commenced on or about the 3d of January, 1852, and that on the 10th of January, 1853, being at that time a bona fide resident of that state, and having been for more than one year preceding said date a resident of said state, he filed his bill against the plaintiff in this suit, for a divorce. On the 24th of May, 1853, the plaintiff in this suit not appearing, a decree of divorce was granted. In October, 1855, the defendant in this case returned to this state, accompanied by a woman to whom he had been married in Indiana, after the divorce granted there, with whom he has cohabited here. Upon these facts the complaint was filed, the plaintiff claiming that

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such intercourse of the defendant with the woman to whom he claimed to be married was adulterous, and entitled her to a divorce.

S. S. Lyne and F. R. Tillou, for the plaintiff.

B. F. Cowles, for the defendants.

DAVIES, J. I deem it unnecessary to discuss the many questions presented in this case. It appears to me that it must be disposed of on the authority of *Vischer v. Vischer*, (12 Barb. 643,) and the authorities there referred to. The court in Indiana never had jurisdiction of the plaintiff in this case, and the proceedings there, as to her, are void. As remarked by Justice Hand in the case referred to, "It is a sound principle of law, as well as of natural justice, that no person should be bound by a judgment without being heard." And he cited a large number of cases to sustain his position. In this state, beside the case of *Vischer v. Vischer*, above cited, the same principle in reference to divorces was applied in the case of *Borden v. Fitch*, (15 John. 121.) In that case, the husband being in the state of Vermont, applied there (his wife then being in Connecticut, and never having been in Vermont, and having no notice of the proceedings) for a divorce, which was granted. He came into this state and married another woman, his first wife being still living, and the case turned upon the effect of the divorce granted in the state of Vermont. Thompson, C. J. in delivering the opinion of the court, says that it appeared from the testimony that the former wife never was in the state of Vermont, nor in any manner personally notified or apprised, at the time, of the proceedings in Vermont to obtain the divorce. She did not, in any manner, by her agent or attorney, appear or make any defense against such proceedings. A precisely similar state of facts is presented in the case now under consideration. The chief justice says: "The final question is, whether such proceedings in Ver-

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mont were not absolutely void. To sanction and give validity and effect to such a divorce, appears to me to be contrary to the first principles of justice. To give any binding effect to a judgment, it is essential that the court should have jurisdiction of the person and of the subject matter; and the want of jurisdiction is a matter that may always be set up against a judgment when sought to be enforced; or, when any benefit is claimed under it, the want of jurisdiction makes it utterly void and unavailable for any purpose."

These positions are well sustained by authority and sound reasoning, and I have been unable to find any case where the force of this has been questioned. We have already seen that it was recognized as law in the case of *Vischer v. Vischer*, above referred to, and I feel no hesitation in saying that I am not at liberty to question the binding force of these authorities. They decide the precise point presented in this case, holding a decree obtained as this was to be utterly void and unavailing for any purpose whatever. It therefore follows that it affords no legal justification for the defendant in cohabiting with any other woman than the plaintiff, his lawful wife; and the facts of such cohabitation, and the other facts necessary to entitle the plaintiff to a divorce, *a vinculo*, being clearly established, I have no choice but to direct a decree for a divorce. A referee may be appointed to settle the proper alimony to be paid to the plaintiff.

[NEW YORK SPECIAL TERM, January 22, 1869. *Davis*, Justice.]

THE NEW YORK ICE COMPANY *vs.* THE NORTH WESTERN
INSURANCE COMPANY.

In an action on a policy of insurance, the plaintiffs, in their complaint, made a claim under the policy, for a loss, and also alleged facts showing that an error had occurred in making out the policy; and they demanded judgment for the amount of the loss, and in case it should be necessary to the recovery, for such further judgment as should be proper. *Held* that both legal and equitable relief was prayed for, and that the cause should have gone to the circuit, for a trial before a jury, where the judge could have granted the relief asked for, and then submitted the other questions to the jury.

But the parties having brought the cause on for trial as an equity case, at a special term, upon the question as to the right of the plaintiffs to have the policy reformed, on the ground of mistake in drawing it, and the testimony in regard to the mistake being conflicting, and the weight of evidence against the plaintiffs, and showing that the contract was made under a mutual mistake of the parties, but that no mistake occurred in filling up the policy; *Held, further*, that the plaintiffs were not entitled to the relief asked for.

Held also, that the plaintiffs having tried their action before a judge at special term, without a jury, as an equity case, and having failed there, in obtaining the equitable relief sought, the special term had no authority to try the right of the plaintiffs to recover for a loss, under the policy as it was drawn, or to send the case to a jury, for a second trial.

Equity has no authority to make, for parties, a contract which they never entered into. And where the relief sought is to reform a contract, that can only be granted by making the contract as both parties intended to make it. Unless it clearly appears that both parties agreed together, as the plaintiffs allege they did, the plaintiffs cannot have the relief asked for.

ACTION on a policy of insurance against loss by fire. The material facts are sufficiently stated in the opinion of the court.

N. Merrill, for the plaintiffs.

INGRAHAM, J. The plaintiffs brought this action against the defendants, on a policy of insurance against loss by fire. In the complaint they averred their claim on the policy for the loss, and they also averred facts from which they claimed that an error had occurred in the making out of the policy of insurance, and they demanded judgment against the defendants for the amount of the loss, and in case it should be neces-

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sary to the recovery that the policy should be reformed and corrected, for a further judgment as might be necessary.

It is apparent that both legal and equitable relief is prayed for in this complaint, although the main cause of action is to recover for the loss, and the equitable relief is merely sought for if it shall be found necessary for the plaintiffs' recovery. That equitable relief was to reform the policy, by correcting the alleged mistake.

It appears to me that this cause should have gone to the circuit, for trial. There the plaintiffs could have tried their action to recover for the loss, before a jury; and as both the legal and equitable relief is prayed for, the judge holding that court could have granted such relief and then submitted the other questions to the jury.

But the parties have seen fit to bring the cause for trial before the special term, and the only question submitted to me is as to the right of the plaintiffs to have the policy of insurance reformed, in what they allege to be a mistake.

Upon the trial it appeared that the testimony of the witnesses did not agree as to the facts. The broker who obtained the insurance states a case from which such a mistake might be inferred, while the agent of the defendants denies such statements, and shows on his part that no such mistake occurred, but that the policy was made out in strict compliance with the application of the broker. As to some of the matters stated by the plaintiffs' witness, he is also contradicted by a clerk in the office of the defendants. I am not able to say, under such circumstances, that the plaintiffs have made out a case entitling them to the relief they ask for. 1st. Because the evidence is contradictory, and the weight of the evidence is against the plaintiffs. 2d. Because, if the witnesses on both sides are correct in their testimony, it shows that the contract was made under a mistake of the contracting parties, and not that the mistake occurred in filling up the policy. Equity has no authority to make a contract for parties which they never entered into; and where the relief sought is to reform

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a contract, that can only be to make the contract as both parties intended to make it. The plaintiffs have no more right to have the contract made as they intended it to be, than the defendant has to have it made according to his understanding. And unless it clearly appears that both parties agreed together, as the plaintiffs allege they did, they cannot have the relief they seek for.

The only conclusion I can adopt, on this evidence, is that there was a mutual mistake as to the description of the premises, arising from a misunderstanding of the parties in the original negotiation of the contract, and that the defendants' agent in making the policy, made it as he intended it should be when he agreed to insure the property. The policy was made out according to the description entered by him in the books of the company, was delivered in that form to the plaintiffs' agent, and although corrected afterwards, in another matter, was never objected to for the cause now alleged, until after the fire had taken place. It is true this agent says his attention was never called to it until after the fire, but still there is nothing to show any error on the defendants' part. Upon this branch of the case I am clearly of the opinion the plaintiff is not entitled to the equitable relief demanded.

Another question is presented in this action, under the code, which is not free from difficulty. The plaintiffs ask to have a further trial as to their right to recover on the policy of insurance as it is, although the equitable relief sought is denied.

Under the former system, there was no doubt as to the rule, that if the equitable relief sought for was granted, a court of equity obtained jurisdiction over the whole subject matter, and could adjudicate upon the same, although the plaintiff had a legal remedy. (4 *Cowen*, 717. 10 *John*. 596.)

But if the plaintiffs fail entirely in obtaining the equitable relief asked for by them, I am not aware that the court ever retained jurisdiction of the subject matter to enable the plaintiffs to recover the claim for which, under the circumstances

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or independent of the equitable relief sought, their remedy was purely legal. (1 *Gilman*, 187.)

By the constitution this jurisdiction, both equitable and legal, is now vested in the same tribunal, and by the code the distinction between equitable and legal remedies is said to be abolished, although by some provisions therein such distinction is still maintained.

It has been doubted by some judges whether such distinction can be abolished by the legislature further than as to the mode of proceeding. A different construction was given to the code by the court of appeals in *Giles v. Lyon*, (4 *Comst.* 600,) Gardiner, J. referring to the 69th section of the code, abolishing the distinction between actions at law and suits in equity, and the preamble to the code declaring that such distinction should not be longer continued, says: "They [the legal and equitable remedies] were to be blended and formed into a single system, which should combine the principles peculiar to each, and be administered thereafter through the same forms and under the same appellation." The case of *Marquat v. Marquat and wife* seems to involve this question. That case was tried as an equity cause, before the special term without a jury, and was one in which the plaintiff only demanded equitable relief. Upon the trial Mr. Justice Parker decided that the plaintiff was not entitled to the relief demanded, but inasmuch as it appeared that the plaintiffs had a legal claim to recover back money paid by them to one of the defendants, he rendered judgment against one defendant, and dismissed the complaint as to the other. This decision was reversed at the general term, the court holding that inasmuch as the plaintiffs had failed as to the equitable relief demanded in the complaint, they could not recover against one defendant for a claim not stated in the complaint, and of an entirely different nature. (7 *How. Pr. Rep.* 417.) The court of appeals, in 2 *Kern.* 336, held that the special term was right in its judgment. They say: The case made by the complaint and the limits of the issue alone determine the power of the court.

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These expressions of the statute include the statement of the right of the plaintiffs and its infringement by the defendants. These constitute the case. The addition to these material facts of others which neither show a right in the plaintiffs nor a wrong thereto on the part of the defendants, do not add to, or alter, the legal case contained in the complaint.

Those matters in the complaint which did not show a right in the plaintiffs were surplusage, to be disregarded if there were other facts which made out a cause of action.

In *Crary v. Goodman*, (2 *Kernan*, 266,) Johnson, J. says, since the enactment of the code, which in terms abolishes the distinction between actions at law and suits in equity, and prescribes but a single form of civil action, the question in an action is not whether the plaintiff has a legal right or an equitable right, or the defendant a legal or an equitable defense, but whether, according to the whole law of the land applicable to the case, the plaintiff makes out the right which he seeks to establish, &c.

The views, however, so strongly expressed in these cases, appear to have been somewhat modified in *Reubens v. Joel*, (3 *Kernan*, 488,) in which it was held that in an action to recover a debt the plaintiff could not unite with such claim, one to restrain his debtor from disposing of his property fraudulently. Selden, J. in the opinion delivered in that case, says: "It is in my judgment clear, that the legislature has not the constitutional power to reduce all actions to one homogeneous form, because it could only be done by abolishing trial by jury, or by abolishing trial by the court," &c.

And again: "The case of *Parsons v. Bedford* (3 *Peters*, 483) is a direct authority to show that the constitution, by conferring jurisdiction in law and equity, has not only recognized the distinction between them, but placed that distinction beyond the power of the legislature to abolish it, which it could only do by abolishing one or the other." And in the latter part of his opinion he says: "which would tend to confusion and be impracticable, as it would convert an action

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sounding only in damages and to be tried by a jury, into an action seeking equitable relief and triable by the court."

This case seems to depart from the cases before referred to, so far as to hold that the distinction between actions of a law and equitable nature must be observed, so far as relates to the mode of trial, and cannot on that account be united together. If this be so, then the old rule which required jurisdiction to be obtained by a court of equity in order to warrant it in giving the remedy, which without it would have required an action at law triable by a jury, must still be observed.

The plaintiffs' counsel relies upon the case of *Bidwell v. The Astor Mutual Ins. Co.*, (16 N. Y. Rep. 263,) as an authority in his favor. But in that case the equitable relief sought for was granted, and the court held that in such a case there was no need of a new action to recover damages. It is said expressly, "The rule of courts of equity was, where they had acquired jurisdiction and had the whole merits before them, to proceed and do complete justice."

In the present case the plaintiffs have tried their action before me as an equity case, without a jury. Upon that issue they have failed, and judgment must be rendered dismissing the complaint. I am of the opinion there is no authority for me to try the right of the plaintiffs to recover for the loss under the policy, or to send the case again to a jury for a second trial. Such a course would necessarily involve two trials, perhaps two judgments in favor of different parties, and produce difficulties which could not well be surmounted.

The dismissal of the complaint, however, must be without prejudice to the right of the plaintiffs to bring a new action upon the policy; and, under the circumstances of the case, without costs.

BEAN vs. HOCKMAN and others.

A testator, by his will, among other things, devised to his executors all his real estate, excepting the farm devised to his wife, in trust to receive the rents and profits, and after providing that the same should be paid to his wife, and, on her death, in part to his daughter during her life, or until a division of the estate should take place as thereafter provided, directed the executors, from the residue of such proceeds, to pay on account of the moneys due on bonds and mortgages such payments as they could, and to pay all indebtedness of the estate until the estate should be free, clear and discharged of and from all liens and incumbrances; and until such payments could be made, the executors were authorized to invest such proceeds, from time to time. He also directed that after the estate was free of all liens and incumbrances, the executors should continue to receive all the rents and profits thereof, and to divide the residue of such proceeds among his children, and the issue of any that might be dead, yearly and every year, until all the issue then living, of his children, should have arrived at the age of twenty-one years.

Held that none of the provisions of the will, for the accumulation of the rents and profits, were within the terms of the statute relative to accumulations; and that the whole devise to the executors, in trust, was therefore void, and the estate vested in the children of the testator, in fee.

THIS was an action brought for a judicial construction of the will of William Hockman, late of Smithtown in the county of Suffolk, deceased, and to have certain trusts therein declared void. The will was executed on the 14th day of August, 1854, and the testator died June 17, 1856, leaving the same unaltered and unrevoked. The testator, after bequeathing to his wife all his household furniture and effects, and all his personal property, and a farm in Smithtown, with the farming utensils, stock, grain and crops thereon, devised and directed as follows: "*Item.* I give, devise and bequeath unto my executors hereinafter named all the real estate that I now own, or shall die possessed of, excepting the farm above named, upon the following trusts, that is to say: To receive all the rents, issues and profits thereof, and out of such proceeds to pay, first to my said wife during her natural life, by quarter yearly payments, the one-third part of such proceeds towards her support and maintenance and towards the support and maintenance of my daughter Eliza, and after the death

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of my said wife, then out of such proceeds to pay to my daughter Elice the sum of \$400 yearly and every year during her natural life, or until a division of my estate as hereinafter provided, whichever event shall first happen.

Secondly. To pay all just charges which may accrue or grow due out of, or for, or on account of my said real estate, and all interests which shall or may accrue or fall due on any bond and mortgage, or either, for which my real estate shall or may be held liable; and,

Thirdly, from the residue of such proceeds, to make such payment or payments as they can on account of the principal sum of such bonds and mortgages, or some or one of them, until the whole are paid off, and to pay off all indebtedness of the said estate until the said estate is free, clear and discharged of and from all liens and incumbrances on account thereof; and until they can make such payment or payments, to invest the residue of such proceeds temporarily, from time to time, on good and safe security.

Item. I will and direct, after the death of my said wife, that the before named farm, farming utensils, and all and everything named and embraced in the third item of this my will, be divided by my said executors among my children then living, and the lawful issue of such of my children as shall then be dead, in the manner hereinafter specified for the division of my real estate; and in case it shall become necessary, for the purpose of making such division, to sell the said farm, it is my wish and desire that it shall become the property of some or one of my children, or the issue of some or one of them.

Item. It is my express will and desire that my said executors hereinafter named, or the survivor or survivors of them, shall after my hereinbefore named real estate shall be free and discharged of and from all liens and incumbrances whatsoever, to continue to receive all the said rents, issues and profits thereof, and out of the proceeds, after paying the amounts hereinbefore provided, and after paying all other just charges against my said estate, then to divide the residue of such pro-

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ceeds, and if my said wife should then be dead, the residue of my personal estate among my children then living, and the lawful issue of such of my children as shall then be dead, in the manner hereinafter named for the final division of my real estate; such residue of the proceeds arising from my said real estate to be divided by my said executors or the survivors or survivor of them, at least yearly and every year, until all the lawful issue then living of my children shall have arrived at the age of twenty-one years, then in further trust, as soon as conveniently may be thereafter, to divide all my real estate, and all the residue of the proceeds arising therefrom, equally, share and share alike, to and among such of my children as shall then be living, and the then living lawful issue of such of my children as shall then be dead, such issue to take the share or proportion that his or her or their parent would have taken if then living, and no more."

The testator left four children, and two grandchildren, the children of a deceased daughter, his heirs at law, him surviving, all of whom are now above the age of twenty-one years. The wife of the testator died after the making of the will, but before his death. The executors proved the will, and took upon themselves the execution thereof.

The complaint alleged that on the 18th of August, 1857, Thomas B. Pope, one of the children of Ann Pope the deceased daughter of the testator, for a valuable consideration, bargained and sold to the plaintiff all his right, title, interest, claim and demand both at law and in equity, and as well in possession as in expectancy, of, in and to the estate of the testator. The plaintiff thereupon brought this action, against the other heirs and the executors, of the testator, alleging that great doubts and difficulties had arisen as to the proper and legal construction of the will; that he had been advised by counsel, and believed, that all the trusts thereof were void, and all the material provisions thereof contrary to law and void; and, praying for a construction thereof, and that the

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same might be decreed and declared to be void, in whole or in part, &c.

The defendants put in an answer stating that the value of the personal estate, of which the testator died seised, did not exceed in value \$1800; and that a part of said personal estate had been sold, and the balance distributed among the next of kin, and that all the debts of the testator, except those secured by mortgage, had been paid by the executors. They submitted that the trusts of the will were valid, and that all its provisions were in conformity with the laws and statutes of the state; and they demanded judgment that the will might be declared to be a good and valid will of real and personal estate, and that the complaint be dismissed.

L. S. Chatfield, for the plaintiff.

J. R. Flanagan, for the defendants.

INGRAHAM, J. The testator, among other things in his will, devised to his executors all his real estate, excepting the farm devised to his wife, in trust to receive the rents and profits, and after providing that the same be paid to his wife, and on her death, in part to his daughter during her life, or until a division of the estate should take place as thereafter provided, directed the executors, from the residue of such proceeds, to pay, on account of the moneys due on bonds and mortgages, such payments as they could, and to pay all indebtedness of the estate until the estate should be free, clear and discharged of and from all liens and incumbrances; and until such payments could be made, the executors were authorized to invest such proceeds from time to time. He also directed that after the estate was free of all liens and incumbrances, the executors should continue to receive all the rents and profits thereof, and to divide the residue of such proceeds among his children and the issue of any that might be dead, yearly and every

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year, until all the issue then living of his children should have arrived at the age of twenty-one years.

This action was commenced to have these trusts declared void.

The first objection, as to the payment to the daughter Eliza, is because its limitation is so connected with the other parts of the will, as to render it impracticable to carry it out if the remaining trust is not sustained. In regard to this bequest there is no difficulty. The intent of the testator evidently was that the payment to the daughter should only continue to the time when the estate should be divided. If the period fixed by him for the division of the property is changed, in consequence of the invalidity of any of the trusts, the time for the payment of this money from the income to the daughter must necessarily also cease; and whenever such division shall take place, whether under the will or sooner by the operation of the statute affecting the trust, at that time the payment to the daughter terminates.

The provision for accumulation is void, as made for a purpose not authorized by the statute. The only accumulation of rents and profits of lands allowed by law (3 *R. S.* 5th. ed. 17,) is for the benefit of minors then in being and during their minority, or in case such accumulation be directed to commence at a subsequent time, it shall terminate at the expiration of the minority of those who are to be benefited thereby. All other accumulations are declared void. The accumulations in this case are for the payment of debts and incumbrances of the estate, and then for the benefit of the children and the issue of any that might be dead, until all the grandchildren should arrive at age.

None of the provisions for this accumulation are within the terms of the statute. The provision for payment of debts is in fact to relieve the personal estate from being applied to this purpose, and necessarily results in an accumulation of money for subsequent distribution. It is also unlimited as to duration, except on payment of all the indebtedness of the estate, and when that will be, is uncertain. The residue of the time for

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which the executors are to receive the rents is during the minority of the grandchildren, but for the benefit of the children. But there is no accumulation, as the rents and proceeds are to be paid over to them as received by the executors.

The difficulty as to this devise is that the whole trust must fail because it is not made dependent on any lives then in being, but upon the lives of some then in being and upon the arrival at age of all the grandchildren, some of whom were not then in existence. I think there can be no doubt but that the devise in this case is not within the provisions of the statute. The power of alienation is suspended during the life of the wife, then during the life of the daughter Eliza, or until a division of the estate as afterwards provided, and after the death of Eliza it is still suspended until all the grandchildren arrive at the age of twenty one years, and is to be continued until there are no grandchildren living who shall be minors. It appears from the pleadings that there are now living eight or nine grandchildren, some of whom were born since the death of the testator, and that there is no probability of failure of issue as to any.

My conclusion is that this devise is void; and that the plaintiff is entitled to judgment declaring such trusts void, and that the estate vests in the children in fee.

Judgment accordingly.

[NEW YORK SPECIAL TERM, December, 23, 1859. *Ingraham*, Justice.]

D. & H. C. PERKINS vs. CHURCH,

To sustain an action against a stockholder of an incorporated company, for a debt of the company, it is not necessary for the plaintiff to aver that the corporation is insolvent; except in those cases where the charter makes the liability of the stockholders depend upon the existence of such insolvency, or requires the creditor to exhaust his remedy against the corporation, before proceeding against a stockholder.

In other cases, where a debt is unpaid at maturity, the creditor may proceed to collect his claim, either from the corporation or those who, by the charter, are made responsible for the debts.

An agreement between a banking corporation, located in Wisconsin, and commission merchants and factors in the city of New York, by which the former is to consign produce to the latter for sale on commission, against which drafts are to be drawn, and to keep the drawees in funds to meet the same, in cases where consignments are not made, is not necessarily illegal, in the absence of any thing to show what powers are possessed by the bank, by virtue of its charter.

Even though a bank has no authority to consign goods for sale, and enter into a general business of that nature, it may, perhaps, resort to that method of selling goods in its possession which it has legally received in payment of debts. *Per* INGRAHAM, J.

In an action by a creditor of a bank against a stockholder, for the recovery of a debt due from the bank, the corporation is not a necessary party.

DEMURRER to complaint. The complaint alleged that the plaintiffs were copartners under the firm name of Dennis Perkins & Co. at the city of New York, in the business of commission merchants and factors. That the Merchants' Bank was a banking corporation located at Madison in the state of Wisconsin, and incorporated under the laws of that state, pursuant to the provisions of "An act to authorize the business of banking in the state of Wisconsin," approved April 19, 1852. That between the 4th of April, 1857, and the 22d of March, 1858, inclusive, the plaintiffs, at the city of New York, lent and advanced to the Merchants' Bank money and accepted and paid, for the accommodation of said bank, drafts drawn by said bank on them, amounting in all to the sum of \$55,880.17, and paid, laid out and expended for telegraph and express charges and protest fees in and about the business of the bank, \$13.73. That said drafts were accepted, and

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payments made, in accordance with an agreement between the plaintiffs and the bank, by which the bank was to consign produce to the plaintiffs, for sale on commission, against which the said drafts were to be drawn, and to keep the plaintiffs in funds to meet all drafts which should be drawn on them, in all cases where such consignments were not made. That \$34,955.41 of the amount of their acceptances and of the drafts aforesaid were paid by them without any funds of the bank then in their hands to pay the same, and in excess of proceeds of sales of consignments received from the bank. That upon that sum of \$34,955.41 the plaintiffs were entitled to a commission of two and one half per cent. That there was due from the bank to the plaintiffs the sum of \$9400.09, which it refused and neglected to pay. That during all the time between the 4th of April, 1857, and March 22, 1858, the defendant was a holder of stock in the bank to the amount of over \$7000. That by the laws of Wisconsin stockholders in every corporation or association organized under the provisions of the banking act are individually responsible for its debts, to the amount of their stock. Wherefore the plaintiffs demanded judgment against the defendant as a stockholder of said bank, for the sum of \$7000, beside costs of suit.

To this complaint the defendant demurred, and specified the following grounds of demurrer, viz: 1. That the complaint did not show that the bank was insolvent, or that the plaintiffs had exhausted their remedy against the bank. 2. That the debt against the bank, specified in the complaint, was not contracted in the legitimate business of the bank, or of any bank created under the laws referred to therein, and could not be made the subject of an action against stockholders, under said laws. 3. That there was a defect of parties defendants, as the Merchants' Bank should have been made a party, and also the remaining stockholders of the bank. 4. That the complaint did not show the capital stock of the bank, nor into how many shares the same was divided. 5. That the complaint did not state facts sufficient to constitute a cause of action.

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Leonard & Hoffman, for the plaintiffs.

George W. Parsons, for the defendant.

INGRAHAM, J. Whatever may be the result of this case, on the trial, I am satisfied the defendant cannot avail himself of the matters of defense set up by him on this demurrer.

1. In order to sue a stockholder of an incorporated company, it is not necessary to aver that the corporation was insolvent, except in those cases in which the charter places the liability subject to the existence of such insolvency, or requires the creditor to exhaust his remedy against the corporation before proceeding against the stockholder. In other cases, when a debt is unpaid at maturity, there is nothing to prevent the creditor from proceeding to collect his claim either from the corporation or those who by their charter are made responsible for the debts without any limitation.

2. The contract of liability as set out in the complaint is not necessarily illegal. What powers the bank possessed by virtue of its charter, is not disclosed in the complaint. In order to bring the charter before the court, it must be proved in the ordinary way. That cannot be on demurrer. Even if the bank had no authority to agree to consign goods for sale, and enter into that kind of business, it would not follow that the contract was absolutely void. It might be that the bank had goods in possession, legally received in payment of debts, and this mode of sale might be legally resorted to by them and the contract be valid. Such matters can only properly be examined on a trial, where evidence can be received to show the circumstances attending the transaction.

No such objection could be made to a part of the plaintiffs' claim, for money lent and advanced to the bank, which was a legitimate business, and which the plaintiffs could recover whether the other part of their claim was valid or not. As the demurrer is to the whole complaint, it could not be sustained on this ground.

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3. I am of the opinion that the bank was not a necessary party. It is only where the parties are united in interest that they must be brought in by the plaintiffs. In other cases, if their presence is necessary to a complete determination of the controversy, the court may order such to be made parties, but that is no ground of demurrer. As to other stockholders, there is nothing in the pleadings from which it can be ascertained that there are any, or who they are, if any.

I think the complaint shows a cause of action. Whether as to the whole claim or not, is immaterial. The claim for money lent and advanced is a legal claim, not subject to any of the objections stated, and is one which, even if on the trial the other claim should be declared void, could still be recovered.

The plaintiffs are entitled to judgment on the demurrer, with leave to the defendant to answer, on payment of costs.

Judgment accordingly.

[NEW YORK SPECIAL TERM, December 23, 1859. *Ingraham*, Justice.]

MAYHEW and others vs. DUNCAN and STEPHENS.

THREE OTHER SUITS vs. THE SAME DEFENDANTS.

Under the code, the duties, upon attachments, which were formerly discharged by the trustees of the debtor's estate, now devolve on the sheriff, who is required to collect the debts due to the debtor; and he is entitled to the same measure of compensation which the revised statutes awarded to trustees, for the like services, viz. all necessary disbursements, and a commission of five per cent on all moneys which come into his hands.

If the sheriff chooses to employ agents to aid him in collecting debts, which he could himself collect without resort to an action or the employment of attorneys or counsel, he must himself compensate his agents; unless an agreement is made by him with all parties interested in the proceeds.

It seems that the sheriff may employ attorneys and counsel, and prosecute actions; and that he is entitled to be paid the necessary disbursements

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therefor, in the same manner that such disbursements were allowed to trustees under the attachment authorized by the revised statutes; whether the action be successful or not, if it be prosecuted in good faith.

THIS was a question as to the propriety of an allowance of five per cent to the sheriff upon an attachment. There were four separate actions, in each of which an attachment was issued. The plaintiff in the fourth suit opposed the allowance.

H. G. Wheaton, for the attaching creditor.

A. J. Vanderpool, for the sheriff.

LEONARD, J. The sheriff of the city of New York, in 1856, received warrants of attachment against these defendants, in four actions, under which he levied on certain books of account, belonging to the defendants, and thereby ascertained the names of over thirty persons who were dealers with the defendants and then indebted to them, in amounts varying from \$5 to about \$250; the most of the demands being, however, under \$100 each. The deputy, who had charge of the process, employed as his agent a person who occupied the same place of business with the defendants, and who was engaged in the same business, and possessed other facilities for more readily and conveniently collecting these book demands than the deputy. The attorneys in the second and third attachments consented to the employment of the agent, and to the rate of compensation to be paid to him by the sheriff, which was fixed at five per cent.

The first three attachments have been discharged, and a small sum remains in the sheriff's hands applicable to the fourth attachment, which would be considerably increased if the five per cent which the sheriff agreed to pay to his agent for collecting the demands which were attached, should be disallowed. And the counsel for the plaintiff in the fourth attachment opposes the allowance of this per centage to the sheriff, as an improper or excessive expenditure for the agency or serv-

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ices of another, to perform duties which the law has imposed, as the plaintiff alleges, on the sheriff himself. That application is the question principally to be considered.

By the code, under which these attachments were issued, (section 232,) the sheriff is authorized to take such legal proceedings for the collection of the debts and credits of the defendants as may be necessary, either in his own name or in the name of the defendant. Under § 237, subdivision 4, the sheriff is to proceed to collect the notes and other evidences of debt, &c. and apply the proceeds to the payment of the judgment, in case judgment has been entered for the plaintiff. And the court is authorized, on the affidavit of the sheriff that he has used diligence and endeavored to collect the evidences of debt so attached, and that a portion remains uncollected, to order the sheriff to sell the same.

And further, showing that it was not contemplated by the code that the sheriff should personally collect, in all cases, the evidences of debt which he should attach, it is provided by § 238, that actions authorized to be brought by the sheriff may be prosecuted by the plaintiff, upon delivering to the sheriff an undertaking with two sureties, to indemnify him from all damages, costs and expenses on account thereof, not exceeding \$250 in any one action. Section 243 provides that the sheriff shall be entitled to the same fees and compensation for his services, and the same disbursements, as are allowed for *the like services* and disbursements under chapter 5, title 1, part 2 of the revised statutes.

The compensation to sheriffs for services, &c. under that chapter of the revised statutes, (relating to attachments against concealed, absconding and non-resident debtors,) is regulated under chapter 10, title 3, part 3; and in addition to certain fees and poundage, specifically fixed, the sheriff is thereby authorized to receive such compensation for his trouble and expenses in taking possession of and preserving the property attached, as the officer issuing the attachment shall certify to be reasonable.

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It is manifestly just that the sheriff should have a suitable compensation for such services as he has rendered in these actions, and the rate which was agreed on by the attorneys in the second and third attachments herein does not appear unreasonable, under the circumstances. It is the same commission that collecting agents are commonly allowed in this city, except under particular circumstances, when agents receive sometimes a larger and sometimes a smaller commission, varying by agreement or according to the difficulty of the service.

Under the statutory fees to sheriffs, above referred to, the authority to afford compensation for collecting the book accounts and debts under these attachments, must be included, if it exists at all by that fee bill, under the language above quoted from chapter 10, authorizing the officer issuing the warrant to certify additional compensation for trouble and expense in taking possession of and preserving the property attached. In these cases, however, the sheriff took possession of books of account and debts only, and the expense and trouble of rendering that service, and of afterwards preserving them, does not appear to be very great.

It would be a very great straining of this language to allege that it includes the trouble or expense of collecting debts. This conclusion is still stronger when we refer to the duties required of the sheriff under chapter 5, title 1, part 2, none of which consist in collecting debts due to the debtor in the attachment; and of course the sheriff's fee bill for services or expenses under this chapter contains no provision for services or expenses which he is not by law required to perform.

New duties and obligations have been imposed upon the sheriff by the attachment authorized by the code, for which no fees had been theretofore provided, because there were no such duties or obligations existing; and unless we can find a proper compensation in some other provision of law, it must be attributed to a legislative oversight. But such is not the case. The code (§ 243) provides the adequate compensation required. It seems to have been assumed by the counsel who

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argued this motion, that the measure of the sheriff's compensation was, by § 243, to be fixed under the provisions of chapter 10, title 3, part 3, regulating the fees of sheriffs.

The provisions of the code (§ 243) are, that the sheriff shall be entitled to the same fees and compensation for services, and the same disbursements, as are allowed by law for like services and disbursements under chapter 5, title 1, part 2 of the revised statutes. Allowed to whom? Not to sheriffs only. Section 243 does not say that; but such as are *allowed* under chapter 5, title 1, part 2 of the revised statutes. This includes such fees, compensation and disbursements as are allowed to any officer by that chapter, for such services as the sheriff is now required to perform under the provisions of the code respecting attachments.

Referring again to the chapter of the revised statutes respecting attachments, we find that the law required trustees of the estate of the debtor which the sheriff attached to be appointed, and these trustees were authorized to collect accounts and debts due to the debtor in the attachment. These duties under the attachment which the code has provided now devolve on the sheriff. The sheriff is required by the code to collect the debts due to the debtor in the attachment, and he is entitled to the same measure of compensation which the revised statutes, by chapter 5, title 1, part 2, award to trustees for like services. The compensation to trustees by that chapter, (2 R. S. 46, § 29, 1st ed.) is, all necessary disbursements, and a commission of five per cent on all money which comes into their hands.

The claim of the sheriff in these cases is for like services, &c. as those performed by trustees under the attachment of the revised statutes; and he is entitled to the same fees, &c. as are allowed to such trustees. If the sheriff chooses to employ agents to aid him in collecting debts, which he could himself collect without resort to an action, or the employment of attorneys or counsel, he must himself compensate his agent, unless an agreement is made by him with all parties inter-

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ested in the proceeds. I do not doubt that he may employ attorneys and counsel, and prosecute actions, and that he is entitled to be paid for the necessary disbursements therefor, in the same manner that such disbursements were allowed to trustees under the attachment authorized by the revised statutes, whether the action be successful or not, if it be prosecuted in good faith. (*In the matter of Bunch, a non-resident*, 12 Wend. 280.)

If the sheriff claims for disbursements expended by him for protests, or necessary traveling expenses of himself or his agents, they are allowable; but he must specify the nature of the expenditure, item by item; and these items he must verify by the oath of himself or the deputy who paid or incurred the same, or the claim therefor must be disallowed.

[NEW YORK SPECIAL TERM, February 11, 1860. *Leonard*, Justice.]

GALLAGHER and another, administrators, &c. *vs.* WHITE and another, executors, &c.

In case of a guaranty, the obligation to prosecute the principal debtor within a reasonable time, and with due diligence, is a condition precedent to the liability of the guarantor.

There is a material distinction between an omission to prosecute the principal debtor, altogether, and an omission to prosecute within a reasonable time, and with due diligence.

A reasonable time is not a definite time, and must always depend upon the particular circumstances of the case presented.

If a guarantor intends to rely upon a want of diligence in collecting, or in efforts to collect, the money due from the principal debtor, as a real and substantial defense, he should raise and present the question distinctly, for the judgment of the court, by asking for specific instructions to be given to the jury.

Where a subsequent holder of a promissory note sues upon a guaranty indorsed thereon, claiming that the guaranty passed to him on the transfer of the note, it is competent for the guarantor to show that it was not the intention of the parties that the guaranty should accompany the note, on the transfer

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of the latter to the plaintiff, but that on the contrary, it was expressly agreed that he should take the note at his own risk.

B. made a note, payable to W. or bearer. W. transferred the note to B., in part payment for a piano, at the same time guarantying its collection, by an indorsement upon the back thereof. B. failing to pay the note, at maturity, W. took it up from B. He subsequently transferred the note to the plaintiff, who expressly agreed to take the same at his own risk. Through inadvertence, however, the guaranty was not erased, at the time of the transfer. *Held* that the guaranty being a contract between W. and B. when W. paid B. the amount of the note and took it up, the guaranty was *functus officio*; and having performed its office, its force and vitality was gone; and that consequently the plaintiff could not maintain an action thereon.

THIS action was brought by James B. Gallagher against Stephen White. Both parties having died, after the commencement of the suit, the same was continued by George Gallagher and B. W. Olapp, the administrators of the plaintiff, against Calista White, executrix, and J. C. Streeter, executor of the defendant. The action was brought by the original plaintiff, as holder of a promissory note made by one Swan, upon a guaranty indorsed thereon, signed by Stephen White.

John N. Whiting, for the plaintiffs,

Thomas Nelson, for the defendants.

By the Court, BROWN, J. This is an appeal from a judgment entered upon a verdict rendered at the Kings circuit, before Mr. Justice EMOTT, in November, 1858. The defendants' testator, Stephen White, was prosecuted as the guarantor of a promissory note, of which James B. Gallagher became the holder, and upon the back of which the alleged guaranty was written. The note was dated November 14th, 1853, for the sum of \$134, payable to Stephen White, the defendants' testator, or bearer, six months after date, with use, and was signed by Elias A. Swan. The guaranty was in these words: "For value received, I hereby guaranty the collection of the within note," and was signed "Stephen White." The note, with the writing upon the back in the form described, came

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to the hands of one Hiram Taylor, in the manner which I shall hereafter more particularly state, in March, 1856, who passed it to James B. Gallagher, the plaintiffs' intestate, in April, 1857, in payment or part payment for goods sold to Taylor. On the 8th of May, 1857, James B. Gallagher commenced an action against Swan, the maker of the note. He obtained a judgment, on the 28th of the same month, for the principal and interest due thereon, with the costs of the action, and immediately issued an execution thereon to the sheriff of the city and county of New York, where Swan resided, which was returned wholly unsatisfied on the 16th June, 1857.

Assuming the force and validity of White's guaranty, for the present, his promise and obligation was that the note could be collected from the maker, if Taylor would, within a reasonable time, and with due diligence, prosecute the same to judgment and execution against the maker. This obligation to prosecute within a reasonable time and with due diligence was a condition precedent to the liability of the guarantor. (*Moakley v. Riggs*, 19 *John*. 69. *Kies v. Tift*, 1 *Cowen*, 98. *Thomas v. Woods*, 4 *id.* 183. *Backus v. Shipherd*, 11 *Wend.* 629. *Burt v. Horner*, 5 *Barb.* 501, where most of the authorities are referred to.) There is a very material distinction between the omission to prosecute the principal debtor altogether, and the omission to prosecute within a reasonable time and with due diligence. A reasonable time is not a definite time, and must always depend upon the particular circumstances of the case presented; because if the principal debtor was hopelessly insolvent at the time of the making of the guaranty, and so continued, the guarantor could not be prejudiced by an omission to prosecute within two months or ten months, or any other given period. If a suit instituted and prosecuted to judgment at the expiration of twelve months would be as effectual to collect the money from the principal debtor, as one instituted and prosecuted at the expiration of two months, the guarantor would have no reason to complain that he had suffered injury from the laches of the creditor. This I understand

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to be the doctrine of the authorities, upon the question of due diligence and reasonable time. In the present case, fourteen months elapsed between the time the note was passed over to Hiram Taylor and the commencement of the action against Swan, the maker. It appeared from the proofs that it was past due at the time of the transfer, and that Swan was utterly insolvent at the time, which fact was well known to both Taylor and White. This insolvency has continued without any amendment. The question principally discussed upon the argument of this appeal was this same question of reasonable time and due diligence; the defendants' counsel insisting that the lapse of fourteen months before the commencement of the action against Swan exonerated the guarantor from his liability, while the counsel for the plaintiffs insisted that as the principal debtor was insolvent during the entire period, and wholly unable to respond, the delay to prosecute was not unreasonable or prejudicial to the guarantor. In looking into the bill of exceptions, however, I do not see that this question is presented. No reference was made to it upon the trial. The attention of the judge does not seem to have been called to it, except by the motion for a nonsuit, at the close of the plaintiffs' evidence, and this assumed that the question was one of law exclusively. It was not submitted to the jury as one of the propositions of his charge, nor was he requested to submit to them any instructions in regard thereto. Judging from what is disclosed by the bill of exceptions, and the manner in which the defence was conducted, the counsel for the defendants seem to have conceded the fact that there was no lack of diligence, or an unreasonable delay in prosecuting the claim to judgment and execution against Swan, the maker of the note. Mr. Justice Nelson, in *Backus v. Shepherd*, (*supra*,) thought that a question similar in its nature was a mixed question of law and fact, and should have been submitted to the jury. This was also the view taken by the court in *Thomas v. Woods*, (*supra*.) Now if the defendant intended to rely upon the want of diligence in collecting, or in efforts to

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collect, the money due on the note from Swan, as a real and substantial defense, he should have raised and presented the question distinctly for the judgment of the court, by asking for specific instructions to be given to the jury.

There is, however, a serious and insuperable impediment in the way of the plaintiffs' recovery, which I shall now proceed to examine. The contract of guaranty is a special contract. When the subject is the payment or the collection of a promissory note, whether the guaranty be written upon the back of the note or in a separate paper, the guarantor cannot be charged either as maker or indorser. "There are cases which hold that the guarantor of a promissory note may sometimes be treated as maker, and sometimes as indorser. This has usually been allowed for the purpose of giving effect to the supposed intention of the parties, as ascertained by extrinsic evidence; though there has not always been so fair an apology for altering the contract. But on whatever ground the courts may have acted, it is a dangerous proceeding. At the very best it violates the salutary rule that all prior negotiations between the parties are to be deemed merged in the final written agreement, and allows that agreement to be overruled by the conversations that preceded it. But the courts can have no right, under color of construing the agreement, to say that it means something else from what the language of the instrument plainly imports." (*Judge Bronson, in Brown v. Curtiss*, 2 Comst. 225. See also *Lamourieux v. Hewit*, 5 Wend. 307.) The holder of such a note with a guaranty indorsed thereon has no such rights as an indorsee for value, against the guarantor, because the guaranty is not strictly negotiable under the law merchant. In *Cooper & Peabody v. Dedrick*, (22 Barb. 516,) Mr. Justice Marvin held that the production and possession of a promissory note payable to bearer was *prima facie* evidence of title in the plaintiff. And as the guaranty was upon the note, the transfer of the note carried with it the guaranty, as incident thereto. Under the provision of the code, the party in interest would bring the action in his own

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name. The bearer or indorsee of a promissory note, with such a guaranty indorsed upon the back of it, would take the latter as assignee of a special contract, and in his hands it would be subject to every defense which might have been made against it in the hands of the person to whom it was said to have been given. If he made and entered into it he could not, in an action at law, certainly, show that it was not intended he should be bound by it, or that his duty and obligation was different from that expressed in the instrument. But he would be at liberty to show that he did not make it; that it had not been delivered; that it came to the hands of the party who claimed to have received it from the guarantor, by accident or mistake; or that it was surreptitiously obtained; or in fact any thing else which would establish that no such contract of guaranty had ever been made. The instrument under consideration is not under seal, but is of that class denominated parol contracts. Hiram Taylor, the person with whom it is claimed that the defendants' testator made it, was not named in the written instrument as a party to it; and if it was competent for him or those who claimed by transfer from him his right to it by showing that it passed to him with Swan's note, it was competent for the defendants to disprove that fact by showing that it was not intended by either party that it should pass with the note. This was substantially the view taken of the transaction by the judge at the trial; for he told the jury, "that as the guaranty was on the back of the note when it was passed by White to Taylor, the presumption of law was that the guaranty was delivered to Taylor, but that this presumption might be rebutted by clear proof that it was not the intention of the parties that it should be delivered." It will be seen, presently, that this delivery was the sole element in this pretended contract. The testimony on the part of the plaintiffs was quite brief. They proved and produced the note with the guaranty indorsed upon the back thereof. They also proved that Hiram Taylor transferred it by delivery to James B. Gallagher in payment of the goods sold; the commencement of the suit;

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the judgment and the execution against Swan ; and the return of the execution unsatisfied. They also established, by the admission of the defendants' counsel, that Swan had been insolvent since the making of the note, and White knew it. That the note was given by Swan to White, who, in the latter part of November, 1853, and before the note matured, transferred it to one Berry, in part payment for a piano, at which time he wrote and signed the guaranty on the back, which was the condition on which Berry accepted it. Swan did not pay the note at maturity, and White then took it up from Berry and kept it amongst his papers until it was passed to Taylor in March, 1856. Here the plaintiffs rested. The defendants thereupon moved for a nonsuit, which the court refused, and the defendants excepted. The plaintiffs offered no other evidence.

The defendants then proved by the deposition of the defendant Stephen White, and by three other witnesses present at the transaction, that at White's store in Watertown, in March, 1856, Hiram Taylor, who was a dealer in watches, was negotiating with White to sell him a watch in exchange for some furs. In the course of the negotiation White said he had a note against Swan, not worth any thing, which, with the furs in the store, he would give for the watch. He also said he did not consider the note worth any thing. That he had once passed it off and guarantied it, and was obliged to take it up. Taylor, he said, might get something for it. Taylor must take the note at his own risk, as he (White) did not consider it worth any thing. The exchange of the furs and the note for the watch was consummated upon these terms. Willet Barr, one of the witnesses, thinks White said he would not be bound by the guaranty ; but White himself says nothing was said upon the subject of the guaranty, and that he did not think of it at the time. All the four witnesses concurred, however, that Taylor was to take the note at his own risk, and that White said he did not regard the note of any value. These facts were not put in doubt or dispute by any thing which oc-

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curring at the trial. The plaintiffs examined no witnesses upon that part of the case, but relied for proof of the contract upon the note being in Taylor's hands with the guaranty written upon it. It appeared by the plaintiffs' own showing, that it had been written and signed as a contract with Berry. That White had paid Berry the money due upon the note at maturity, in execution of the contract, and taken it up. It was *functus officio*. It had performed its office, and its force and vitality were gone. Beyond the mere transfer of Swan's note, there was no contract of any kind between White and Taylor. "A contract includes a concurrence of intention in two parties, one of whom promises something to the other, who on his part accepts such promise." The presence of the written guaranty on the back of the note is explained. It was put there as the evidence of a contract of guaranty with Berry and not with Taylor. The proof shows that it was left there at the time of the transaction with Taylor by accident and mistake; the parties either not thinking of it, or not realizing the uses which might afterwards be made of it; for the proof is indisputable that the note was regarded at the time as of little or no value, and that Taylor was to take it at his own risk, and not upon the credit of White.

When the evidence upon both sides was closed, the defendants renewed their motion for a nonsuit, which the court denied, and they excepted. They then requested the court to direct the jury to find a verdict for the defendants, which the court declined to do, and thereupon the defendants again excepted. The jury then found a verdict for the plaintiffs, for the amount of the note and the interest. I think the court erred in declining to instruct the jury to find a verdict for the defendants. There was literally nothing for the jury to pass upon. There was no conflicting evidence and no disputed facts. The whole case resolved itself into a question of law, and that was whether the facts to which I have referred constituted a contract of guaranty between White and Taylor. To leave it to

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the jury was to invite them to enter a province which belonged exclusively to the court.

The judgment should be set aside and a new trial ordered, with costs to abide the event.

[KINGS GENERAL TERM, February 13, 1860, *Lott, Emott and Brown*, Justices.]

GRIGGS and others vs. HOWE and others,

Where the defense of usury is set up, the defendant is required to show a corrupt and illegal contract by which more than seven per cent was taken, for the use or loan of the money advanced.

He is bound to set up the contract in his answer, giving its terms, and the amount of the usurious premium or interest taken by the lender. And the usury must be proved as set up in the pleading.

Where an answer set up one entire contract for the discounting of two drafts for \$1250 each, and the taking of the sum of \$125 as premium or interest, and the proof made out two contracts, each at a discount of one-eighth of one per cent, for the time which would elapse before maturity, but the time for which the discount was taken, or the sum taken was not shown; *it was held* that the variance was fatal to the defense.

A decision of the court, at the trial, imposing terms as a condition of granting leave to amend an answer, will be deemed to be acquiesced in, unless an exception is taken, at the time.

Where two drafts were drawn in blank as to the amount, upon the defendants, and accepted by them, payable to the order of W., the maker, with the express understanding that the sums to be inserted should not in the aggregate exceed \$1000, and W. exceeded and disregarded this limitation of his authority, and filled in the blanks in the drafts with the sum of \$1250 each, and negotiated the drafts to the plaintiffs, before maturity, who paid him the money upon them without notice that W. had exceeded his authority; *Held* that under the circumstances, the plaintiffs were to be deemed bona fide holders for value, and that the commercial character of the paper would protect it, in their hands, from the defense that W. exceeded his authority.

Held also, that the acceptors having, themselves, put it into W.'s power to do the wrong, they could not be allowed to shift the loss from themselves, and cast it upon a bona fide holder for value. That of the two they were the least innocent.

A PPEAL from a judgment entered at a special term. The action was brought against the defendants (partners under

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the name of O. B. Howe & Co.) as acceptors of two several bills of exchange, drawn by H. L. Webb, dated June 9th, 1855, for \$1250 each, payable at the North River Bank, at two and three months from date. The defendants, survivors of Herrick, answered separately, presenting the following points: 1. That O. B. Howe accepted the drafts in the name of the firm, as accommodation acceptors, without the consent or knowledge of the other defendants. 2. That they were accepted with the sum left blank, to be filled up by the drawer, but with the agreement that said drafts, together with another one accepted at the same time, were to be filled with sums which in the aggregate would not exceed \$1000. 3. That Webb, without the knowledge or consent of any of the defendants, filled each of the drafts in suit with the sum of \$1250, contrary to the agreement. 4. That afterwards, and before the drafts had inception, Webb transferred them to the plaintiffs at an usurious rate of interest, and that the plaintiffs are not holders in good faith.

On the trial, the defendants proved their allegations in reference to the manner of acceptance, and the filling up afterwards by Webb. It further appeared that Webb negotiated the drafts to the plaintiffs; the one at two months, at a discount of one per cent a day from the time of discount to maturity, and the other at one-eighth of one per cent a day for the same time. After the maturity of the drafts, Webb turned out as collateral a note of \$2000 against the New York Barrel Manufacturing Company, which was prosecuted to judgment and execution by the plaintiffs, and the proceeds of sales under the execution were \$1920.74. Of this, \$1264.96 were credited on the drafts, the reduction being principally made by fees peculiar to the sheriff of New York. The defendants insisted that the reduction should be only the legal poundage and fees of the sheriff, but the circuit judge declined so to instruct the jury. The jury found a verdict in favor of the plaintiffs for \$1264.96. The defendants moved, at a special

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term, for a new trial. The motion was denied, and the defendants appealed.

P. T. Woodbury, for the plaintiffs.

S. B. Cushing, for the defendants.

By the Court, BROWN, J. Upon the trial of this action the jury found specially, as a fact in the case, that the drafts which were the subject of the action were not accepted by O. B. Howe & Co., the defendants, for the accommodation of Henry L. Webb, the drawer, merely, but were accepted for the purpose of taking up negotiable paper, on which the names of O. B. Howe & Co. were outstanding as indorsees or acceptors; such paper having been negotiated by them. All question therefore upon this appeal as to the character of the paper is put at rest by this finding of the jury.

The drafts were accepted in blank as to the amount, payable to Henry L. Webb, the maker's own order, with the express understanding that the sums to be inserted, in the aggregate should not exceed \$1000. They were both dated on the 9th June, 1855, payable three months after date. He filled them up with the sum of \$1250 each, and negotiated them to the plaintiffs before maturity, who paid him the money upon them. One of the defenses was usury, and under it the defendants were required to show a corrupt and illegal contract by which more than seven per cent was taken for the use or loan of the money advanced upon them. This contract, whatever it was, they were bound to set up in the answer, giving its terms and the amount of the usurious premium or interest taken by the lender. And the usury must be proved as set up in the pleading. (*Vroom v. Ditmas*, 4 Paige, 526. *New Orleans Gas Light Co. v. Dudley*, 8 id. 457. *Curtis v. Masten*, 11 id. 17. *Cloyes v. Thayer*, 3 Hill, 565. *Morse v. Cloyes*, 11 Barb. 100. *Gould v. Horner*, 12 id. 601.) The answer set up one entire contract for the discount of

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both drafts, and the taking of the sum of \$125 as premium or interest. The proof made out two contracts, each at a discount of one-eighth of one per cent per day, for the time which would elapse before maturity; but the time for which the discount was taken, or the sum taken, the witness did not know and could not state. This variance between the contract set out in the answer and that proved upon the trial was fatal to this branch of the defense. The counsel for the defendants made a motion to amend the answers, so that they should correspond with the proof. The court, after hearing both sides, granted this motion upon terms which the defendants refused to accept, and the trial proceeded. These terms were the payment of the costs intermediate the answer and the time of the motion, and that the cause go over until the next circuit. The defense in this respect had failed in its entire scope and meaning, for the usurious contract set up in the answer was not proved. The defendant asked leave to substitute the contracts, which he thought he had proved, for that which he had pleaded. This proposition was admissible only upon one condition—that the plaintiff should have an opportunity to disprove the substituted contracts, if he could. This implied a postponement of the trial to another circuit, and it was quite right it should be at the defendant's expense, as it was exclusively for his benefit. And hence the terms imposed by the court. No exception, however, was taken to this order and decision of the court.

The defendant now urges, as one ground for the reversal of the judgment, that the judge erred in imposing terms as a condition of granting leave to amend, because there was no proof that the plaintiffs were surprised or misled. If the defendants designed to rely upon this objection, they should have excepted to the ruling, at the time. The absence of an affidavit or proof might have been obviated on the spot. The decision of the court upon this point must, like its decision upon all other questions made at the trial, be deemed to be acquiesced in unless an exception is taken at the time.

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(*Brown and others v. The Cayuga and Susq. R. R. Co.*, 12 *N. Y. Rep.* 486.)

There was a blank left in each of the drafts for the sums for which they were to be drawn, and Henry L. Webb was authorized to fill in the amounts, which were not in the aggregate to exceed the sum of one thousand dollars. He exceeded and disregarded this limitation of his authority, and filled in the blanks in the drafts with \$1250 each. Under the circumstances of the case, the plaintiffs are to be deemed bona fide holders for value. The commercial character of the paper will protect it in their hands from the defense that Webb exceeded his authority. The defendants themselves put it into Webb's power to do this wrong, and they cannot be allowed to shift the loss from themselves and cast it upon a bona fide holder for value. Of the two they are the least innocent. In the case of the *Mechanics' Bank v. Schuyler and others*, reported in a note, 7 *Cowen*, 337, the court say: "Accordingly, if the amount be left in blank, any sum may be inserted; if the time of payment, it may be fixed at the pleasure of the holder. And in the hands of a bona fide indorsee, the indorser cannot question the transaction, though the blanks may have been filled in a manner entirely different from the understanding and expectation of the indorser who put his name upon the note." Reference is made to *Russel v. Langstaff*, (*Doug.* 514;) 5 *Cranch*, 151; 2 *M. & S.* 9; 4 *Mass. Rep.* 545. We are referred to the case of *Nazro v. Fuller*, (24 *Wend.* 374,) and also to *Bruce v. Westcott*, (3 *Barb. S. C. R.* 374,) as authorities against the validity of the drafts in controversy. These are cases of material alterations of promissory notes, perfect in themselves. The law is entirely settled that the alteration of a note or bill of exchange, in a material part, renders it wholly invalid, even in the hands of an innocent holder, against a party not consenting to such alteration. (*Chitty on Bills*, 10th ed. 182.) These drafts were not altered in a material part. The blanks for the sums for which they were to be drawn were to be filled in by the

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drawer. He exceeded the sum to which he was limited. But of this fact the indorsees had no knowledge. The consequences of this abuse of authority must fall upon those who created it, and not upon an innocent holder for value. It appeared in the progress of the trial that after the drafts had matured, Henry L. Webb delivered to the plaintiffs a note for two thousand dollars, made by the New York Barrel Manufacturing Company, as collateral security for the payment of the drafts. The plaintiffs prosecuted the note to judgment, and issued an execution, upon which the property of the company was sold, for the sum of \$1920.74. From this sum there was deducted by the sheriff, for auctioneer's fees \$108.79, store rent \$118.57, and for sheriff's fees \$94.64, making in all \$321.98. There was also deducted by the attorneys who prosecuted the claim and attended to the collection of the money the further sum of \$100, for their services. These deductions left the sum of \$1498.76, which was realized by the plaintiffs and applied in part payment of the drafts in this action. The defendants insist that the sheriff's fees and charges for rent, and auctioneer's charges, are illegal and forbidden by the statute, and that there should be credited on account of the moneys collected upon the note the entire sum collected, deducting only \$29.83, the legal sheriff's fees and poundage. This proposition the counsel for the defendants asked the court to deliver to the jury as the law applicable to this part of the case, which the court declined to do, and thereupon the defendants' counsel excepted. There was no proof that the note was to be collected at the expense of the plaintiffs, or that they were to contribute any part of the expenses of its collection. Webb says, in his evidence, that the proceeds of the sale were to be applied upon the drafts, and it was conceded that the net proceeds had been so applied. If the sheriff has retained in his hands a part of the proceeds of the sale for charges which are not strictly legal and chargeable, the plaintiffs are not responsible therefor, because the money has not been realized, and they are only to be charged

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with the proceeds received by themselves or their attorneys. With respect to \$100 retained by the attorneys who prosecuted the note, it appeared the New York Barrel Manufacturing Company put in two answers which were adjudged by the court to be frivolous, and the judgment was entered up without waiting to tax costs, and no costs were included in the judgment. Every practitioner will understand this. The answers were put in to effect delay and postpone the entry of the judgment. The action was against a corporation. It may have been of consequence to all concerned to obtain a speedy judgment, even at the expense of the real holder of the paper. The judge was right, I think, in refusing to instruct the jury that the defendants were entitled to credit upon the drafts for the whole amount of the sales upon the execution against the New York Barrel Manufacturing Company, "less the legal poundage and fees of the sheriff."

All the other requests made by the counsel for the defendants to the court for specific instructions to the jury, which were refused, and all their exceptions to the charge itself, are substantially disposed of in what I have already said.

The judgment should be affirmed.

[KINGS GENERAL TERM, February 18, 1860. *Lott, Emmott and Brown*, Justices.]

 BONNER vs. MCPHAIL.

In an action for slander, where the words spoken are not actionable in themselves, but they may become so by reference to the extrinsic circumstances in relation to which they were spoken, as that they were uttered of and concerning the plaintiff's testimony as a witness on the trial of a cause, the plaintiff must show that they were spoken in reference to a judicial proceeding, before a court or officer of competent jurisdiction.

It must be proved that the court or officer before whom the action was pending had jurisdiction of the subject matter of it, with power to administer an oath and to examine and take the testimony of the witness.

No referee should proceed a step in the exercise of his duties without a certi-

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filed copy of the rule or order appointing him, in his hands. This is his commission, and without it he should not proceed to act. *Per* BROWN, J.

The power of a referee to administer a judicial oath can only be derived from an order of the court appointing such referee. A memorandum "referred to L. K. M." made by the judge on his calendar, at the circuit, is not sufficient to constitute an order. An entry at least in the minutes of the court is required for that purpose.

Some action of the court, shown by its records, is necessary.

An order of reference, made after the report of the referee is filed, with the consent of both parties that it be entered *nunc pro tunc*, will not relate back, so as to give to an extra-judicial oath the effect of an oath legally administered, on which a charge of perjury can be sustained.

The city court of Brooklyn, being a court of special and limited jurisdiction, a referee appointed by it has no power to try a cause in the city of New York.

APPEAL from a judgment of the city court of Brooklyn. The plaintiff complained that while he was giving testimony in an action then pending in the city court of Brooklyn, and on trial in the city of New York, before L. K. Miller as referee, the defendant said, "to hear a man lie," and "you are a liar," meaning thereby to charge the plaintiff with perjury. The defendant, by his answer, denied that the words were uttered respecting the plaintiff's testimony then being given, or that he intended to impute perjury to the plaintiff; but alleged that the words spoken had reference to other testimony previously given in the case. The trial before the referee was on the 25th September, 1857, at his office in the city of New York. No order of reference had then been entered, nor was any such order entered until December 12th, 1857, (more than two months after the trial before the referee,) when an order of reference was entered *nunc pro tunc* as of the first Monday of March, 1857. On the trial of the present action, the plaintiff offered testimony to show that on the calendar of the city court for March term, 1857, a memorandum was made, in the handwriting of the judge of the court, in these words, "referred to L. K. Miller." The defendant objected to the admission of this testimony, which objection was overruled, and the defendant excepted. The plaintiff having testified to the words alleged to have been spoken by the defendant,

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and as to the testimony which the plaintiff was at the time giving, (on the trial before the referee,) when such words were spoken, and two witnesses having testified as to the words spoken, the plaintiff rested, and the defendant moved for a nonsuit, which was refused, and the defendant excepted. On the trial of the present case, it appeared that other testimony had been given at previous hearings in the action before the referee. The defendant (for the defense) was asked what had been testified to previous to the time when the alleged slanderous words were uttered, and objection being made, the question was not allowed, and the defendant excepted. The defendant was then asked of and concerning whom he spoke the alleged slanderous words, which question being objected to on the part of the plaintiff, the question was not allowed, and the defendant excepted.

Joseph S. Ridgway, for the appellant. I. The words charged are not actionable, *per se*, and no special damage is alleged or proven.

II. Perjury is not imputed by the words charged: (1.) Perjury is not charged in terms, nor is that the import of the words charged. Neither is false swearing thereby in terms charged; nor have the words charged a necessary reference or application to any alleged testimony of the plaintiff. Some of the words charged do not in terms or necessarily apply to the plaintiff. (2.) No order of reference had at the time of the alleged slander (September 25, 1857) been made or entered in the action, in which the complaint alleges the plaintiff was giving testimony under oath, and of and concerning which said alleged testimony the complaint alleges the words charged were uttered. In December, 1857, the attorney for the respective parties in the action referred to, consented that an order be entered, *nunc pro tunc*, referring the issues in that action to L. K. Miller, Esq. as referee, to hear and determine; and no order had, prior to the time of said consent in December, 1857, been made or entered. The power and authority of a referee

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to hear and determine and to administer an oath or affirmations to witnesses upon the hearing of a cause, is, under the statute, derived from and depends solely and entirely upon the order of the court in which the action is pending appointing him such referee, and thereby conferring upon and vesting him with such power and authority. Miller was not, at the time of the alleged slander, and had not been authorized or empowered to administer, as referee in the action aforesaid, an oath or affirmation to the plaintiff or any other person; and the alleged oath, purporting and averred in the complaint to have been taken by the plaintiff and administered by said Miller, was not legally administered, and was not a binding oath or obligation. The plaintiff was not under the obligation of an oath, and therefore cannot be indicted for perjury. While it is a question of fact for a jury whether words charged were spoken of and concerning alleged testimony, it is a question of law whether, if such alleged testimony be false, it amounts to perjury; and if it does not, then perjury is not imputed. The test is whether, if false, he can be indicted for perjury. (*Rouse v. Ross*, 1 *Wend.* 475, 477. *Bullock v. Koon*, 4 *id.* 531, 536. *Roberts v. Champlin*, 14 *id.* 120, 121, 122.) (3.) A referee in an action pending in the city court of Brooklyn has out of the city of Brooklyn no jurisdiction of the case, and cannot within the city of New York legally sit as a court, administer oaths to witnesses in, or hear or try such case, or otherwise exercise authority as such referee; and an oath administered, or purporting to be administered, within the city of New York, or elsewhere out of the city of Brooklyn, by such referee, in capacity of referee, to a witness, would be extra-judicial and a nullity. The city court of Brooklyn is a court of special and limited jurisdiction, and is, by the act creating said court, required to be held at the city hall in the city of Brooklyn. (*Laws of 1849*, p. 171, § 10. *Laws of 1850*, p. 149, § 5.) The said city court cannot itself legally hold a court nor legally administer an oath within the city of New York. That court cannot confer upon or delegate to a

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referee other or greater powers or authority than the court itself possesses; nor is the jurisdiction of a referee more enlarged or extended than that of the court appointing him. (4.) The alleged testimony of and concerning which it is alleged the words charged were spoken, is not shown to be material, and the *onus* is on the plaintiff to show it. One witness (the plaintiff) says, "I can't remember the words I had made use of when I was interrupted," nor "whether the testimony I gave that day was on the subject of a contract only." Another witness says, "I don't recollect his testimony, or whether direct or cross." So much of the evidence must be proved as to show its materiality. (*Bullock v. Koon*, 9 *Cowen*, 30.) The proof should be of the evidence at large, or specifically by the minutes of the testimony, or otherwise, to enable the court to judge of its materiality. The evidence has not been proved, and testimony as to the general character of the evidence is not sufficient, and much less when of a part only. The plaintiff must show affirmatively that the testimony was material; and failing to do so, the plaintiff has not laid a foundation for a recovery. (*Crookshank v. Gray and wife*, 20 *John*. 344. *Rouse v. Ross*, 1 *Wend*. 475, 477. *Bullock v. Koon*, 9 *Cowen*, 30. *Roberts v. Champlin*, 14 *Wend*. 120, 121, 122.)

III. The court below erred in admitting testimony touching the memorandum on the calendar of causes. (1.) Such calendar is not a record of the court. (2.) There is no competent or adequate proof as to when such memorandum was made. (3.) Such memorandum is not of itself an order, and confers no power or authority to act as referee. The court below erred in denying the defendant's motion for a nonsuit.

D. P. Barnard, for the respondent. I. There was no doubt of the reference to L. K. Miller of the action on contract between the same parties. The record is conclusive on that point.

II. The words set forth in the complaint were actionable if they referred to the plaintiff and his testimony, as the jury

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by their verdict found that he meant to impute to the plaintiff the crime of perjury. (*McClaghry v. Wetmore*, 6 John. B. 82.)

III. The city court of Brooklyn had jurisdiction of that action, and it was not illegal for the referee to take testimony in New York if both parties consented to it. Such consent is to be presumed, as no objection appears to have been made.

LORT, P. J. The words charged to have been spoken by the defendant were not actionable in themselves. It was therefore incumbent on the plaintiff to show that they were spoken in reference to a judicial proceeding, before a court or officer of competent jurisdiction. This he has failed to do. Assuming that the charge related to the testimony given by the plaintiff in an action tried before Mr. Miller acting as referee, and that such testimony was material and pertinent, yet an additional fact was necessary to be established. It appears that the action in which the proceeding was had was pending in the city court of Brooklyn, and was triable only before the court and a jury, unless it was legally referred to a referee duly appointed, for trial. It was a case in which the examination of a long account was involved, and was therefore properly referable, and there is no doubt that the parties had agreed previous to the trial, by an oral consent, that the issues should be tried and determined by Mr. Miller as referee. His acts under such agreement, although binding on the parties, so far as relates to the judgment rendered, did not constitute him an officer or tribunal clothed with the legal power of administering a judicial oath. That power could only be derived from an order of the court appointing him such referee. (*See Code*, § 421.) No such order had been made at the time the words charged to have been uttered were spoken. The memorandum, "referred to L. K. Miller," made by the judge on his calendar of March, 1857, was not sufficient to constitute an order. An entry at least in the minutes of the court was required for that purpose. Some action of the

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court, shown by its records, was necessary. The order subsequently made, in December, *nunc pro tunc*, on the consent of the parties, does not obviate the difficulty presented in this case.

That was proper to perfect the record in the action, and to obviate any objections that might be made by either party to the acts and decision of the referee, but could not relate back, so as to charge third parties with liabilities, or to give an extra-judicial oath the effect of an oath legally administered, on which the charge of perjury could be sustained. Such an act would be subject to all the objections of an *ex post facto* law.

If, therefore, it be conceded that what the plaintiff stated before the referee was in fact false and material to the issue involved, yet he could not be chargeable with the crime of perjury. The plaintiff's action was consequently not maintainable.

Another objection raised by the defendant appears to be equally fatal, even if it be conceded that Mr. Miller was legally appointed a referee, and that an oath had been duly administered to the plaintiff in the city of Brooklyn, before his examination was commenced. It appears that the testimony was in fact given in the city of New York. The action in which it was taken was pending in the city court of Brooklyn. That court was a court of special and limited jurisdiction, and is to be held in the city of Brooklyn. (*Laws of 1849, p. 171, § 10. Laws of 1850, p. 149, § 5.*) It was incompetent, therefore, for the court itself to sit in the city of New York. Any trial had there would be extra-judicial. It would have no greater effect than if it were held out of the state; and as the court had no special authority vested in it to confer on a referee the power to try a cause out of its own jurisdiction, no such power could be rightfully and legally exercised by him. He at most could only be considered as a judge of the court, for the time being, in the particular suit in which he was appointed, authorized to act to the same extent and in the same manner, and not otherwise, than the court itself.

In either view of the case the plaintiff has no cause of ac-

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tion. It is therefore unnecessary to consider the questions raised during the progress of the trial as to the rejection or admissibility of evidence.

The order of the city court, refusing a new trial, and the judgment in favor of the plaintiff, were erroneous and must be reversed, and a new trial ordered, with costs to abide the event.

BROWN, J. The slanderous words set out in the complaint, and which the defendant is charged with having published, are not actionable in themselves. They may become so, however, by reference to the extrinsic circumstances in relation to which they were spoken. These are, that at the time the words were spoken, the plaintiff was being examined as a witness, upon the trial of an action then pending, upon a question material to the issue, and before a court or officer having authority and jurisdiction to administer oaths and to conduct the inquiry or proceeding in which the plaintiff was sworn. Of this principle the pleader who framed the complaint seems to have been fully aware; for it alleges "that on or about the 25th day of September last, (1857,) the plaintiff was being examined under an oath taken by him and administered by L. K. Miller, Esquire, a referee duly appointed by this court, (the city court of Brooklyn,) to hear and determine the issues in a certain action then pending in said court between the above named plaintiff and the above named defendant, and whilst giving testimony as a witness in said action, which testimony was material for him as plaintiff in said action, the defendant then and there, to wit, at the office of the referee, on the corner of Broadway and John street, in the city and county of New York, in the presence and hearing," &c. spoke and published, of and concerning the plaintiff and his testimony, the alleged slanderous words, which were, "you are a liar," and "to hear a man lie," which are stated with the necessary innuendoes and averments. The words uttered, with reference to the surrounding circumstances, must have

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imputed the crime of perjury to the plaintiff, or the action will not lie. To this end the court or officer before whom the action was pending must have had jurisdiction of the subject matter of it, with power to administer an oath and to examine and take the testimony of the witness; for unless the court or officer had such jurisdiction and power, there could be no legal perjury committed, however false and malicious may have been the statements of the witness. (*Crookshank v. Gray*, 20 *John*. 344. *Bullock v. Koon*, 9 *Cowen*, 30.)

Upon the trial of this action the plaintiff proved the speaking of the words charged, and under the circumstances mentioned in the complaint. He then produced the record in the action of *Bonner* against *McPhail*, in the city court of Brooklyn, in which the plaintiff was being examined as a witness, and in reference to which examination the words were spoken. This was not a formal record made up in the old form with a caption, an entry of the pleadings, an award of a venire or an order of reference, a verdict or report, and the judgment of the court duly entered thereon in regular chronological order. But the record produced consisted of the complaint and answer, separately. An order of reference to Livingston K. Miller, the caption of which was at a term of the city court of Brooklyn, at the city hall, on the first Monday of March, 1857, with a written consent at the bottom, signed by the attorneys, that the same might be entered *nunc pro tunc*. There was also the report of the referee, and an order for judgment thereon, dated December 31st, 1857. The plaintiff also examined Samuel E. Harris as a witness, who produced the order book of the court, and testified that he was the clerk of the city court; that the order of reference in *Bonner v. McPhail*, referred to, was not entered until on or after the 12th December, 1857. That the date of the order next before the order in question, as entered in the book, was December 12th, 1857. So that the order in question must have been entered on or after that day. He also produced the calendar for the March term, 1857, on which there was a memorandum in the judge's handwrit-

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ing, "referred to L. K. Miller," but to what the entry referred, or when made, did not appear. He also said there was no entry in the minutes of court of an order of reference in the action of *Bonner v. McPhail*. It therefore appeared affirmatively, upon the plaintiff's own proof, that on the 25th of September, 1857, the time when the plaintiff, Bonner, was examined as a witness and the words were uttered, Livingston K. Miller was not a referee in the action. No order had been entered upon the minutes of the court, to that effect. It does not appear that any such motion had been made, or that even a written stipulation had been entered into by the attorneys for the respective parties, by which he was to become such referee. His appointment was vested in parol, if it existed at all, and gave him no sort of authority to administer oaths and examine witnesses. His acts as such were extra-judicial. The omission to obtain the order of reference, before the referee proceeded to hear the cause, was doubtless an irregularity, which the parties to the action in which it was committed might waive or correct by stipulation, so as to give effect to the report. An order entered *nunc pro tunc* would do this, but nothing more. If what Bonner, the witness, said on the 25th September was not perjury, by reason that Livingston K. Miller had no power to administer an oath in an action pending in the city court of Brooklyn, it could not be made perjury by any thing which the attorneys or the court might do after that time. Courts of justice speak only through their records, orders, and entries upon their journals or minutes; and before a person can be clothed with the powers and authority of a referee in a pending action and proceed to execute its functions, there must be the fiat of the court signified by an entry or order upon its minutes. The 49th section of the act for consolidating and referring causes, (2 R. S. 305,) declares that an entry of such reference shall be made upon the record, and day shall be given to the parties, from time to time, until the referees report, or they be thereof discharged. When depositions are used as the foundation of an indictment for

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perjury, the authority under which they are taken must be proved with more strictness than in other cases. If the oath was administered under a special authority or commission directed to a particular person for that purpose, the commission, shown in some form, is indispensable. (*Cowen & Hill's Notes*, 1100; note 756, and the authorities referred to by them.) Referees are vested for the time being, and in respect to the particular action in which they sit, with some of the most important powers of the court. They may administer oaths, compel the attendance of witnesses, take their testimony, issue attachments and punish for contempts, allow amendments to pleadings, determine questions of law as well as of fact, and make reports upon which judgments may be entered. The validity of these acts depends exclusively upon the existence and force of the rule or order under which they derive their authority. No referee should proceed a step in the exercise of his duties, without a certified copy of the rule or order in his hands. This is his commission, and without it he should not proceed to act.

The city court of Brooklyn is a local court, with jurisdiction limited to the bounds of the city. The hearing before the referee was had at his office at the corner of Broadway and John street, in the city of New York, and the oath was administered there. The defendant claims that therefor the proceeding was *coram non judice* and void. I decline to consider the force of this objection, because the defect already considered is fatal to the plaintiff's right of action.

The motion made by the defendant for a nonsuit, at the close of the plaintiff's evidence, should have been granted. And for the refusal to grant it, the judgment should be reversed and a new trial granted, with costs to abide the event.

EMOTT, J. concurred.

New trial granted.

[KINGS GENERAL TERM, February 13, 1860. *Lott, Emott and Brown*, Justices.]

PECK vs. HILER.

By the terms of a lease the tenure of the demised premises was to commence on the 1st day of May, 1852. The tenant was to have the use of a certain rail road, in common with others, and was "to put the same in order above the chemical works, if he wished to use it," and the lessor reserved the use of it to himself, also. The road was entirely out of repair. The tenant used a part of it, below the chemical works, for the purposes of his business, for a short time, but he never repaired it, or in any way used the road above those works. Nothing was transported over any portion of it, after July, 1852. The lessee removed a portion of the railway, so as to prevent its use, before any part thereof was taken up by the lessor. The lessor removed a part of the rails, in April, 1853, and the lessee, in May thereafter, with knowledge of such removal, paid to the lessor the rent which accrued during that month. When the rent for the months of June, July and August was demanded of the lessee, he promised to pay it in a few days, and subsequently gave his note for the amount, without making any complaint about the removal of the rails by the lessor.

Held that it was fairly inferable from these facts that the lessee did not wish to use the rail road above the chemical works, and had determined to abandon, and had abandoned, the use of the whole of it, previous to the tearing up and removal of the rails by the lessor, and had by his own acts rendered it incapable of use. That consequently there was no ground for the pretext that the lessor had interfered with the beneficial enjoyment thereof by the lessee; and that though his acts might have amounted to a trespass, they did not constitute an *eviction*.

THIS was an action of ejectment, to recover possession of certain premises in Rockland county, demised by the plaintiff to the defendant, by lease dated February 19th, 1852. The complaint alleged non-payment of thirteen months' rent of premises demised by said lease, which was due to the plaintiff from the defendant at the time of the commencement of this action; also an underletting of said premises by the defendant, in violation of a covenant contained in said lease. The answer did not deny any of the allegations in the complaint, but alleged as a defense a demise of the use of a rail road leading from the demised premises, and the tearing up said rail road by the plaintiff; and also alleged the receipt by the plaintiff of rent accruing after the underletting, with a knowledge of such underletting. The reply denied the de-

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mise of the use of the rail road, as a part of the demised premises, but set out a covenant occurring in such lease, after the habendum clause, and the clause reserving rent, as follows : " The said party of the second part is also to have the use of the rail road in common with others, and to put the same in order above the chemical works, if he wishes to use it." Also alleging that said rail road was, at the time of the execution of the lease, out of repair, and entirely unfit for use, and so remained until after the doing the acts complained of by the defendant, and that the defendant had never repaired such rail road above the chemical works. The reply also alleged that an action was brought by the defendant against the plaintiff, to recover damages for doing the very acts which are in this action claimed as an eviction, and that the defendant in such action recovered damages, upon which recovery a judgment was entered, and the same was paid by the plaintiff before the commencement of this action ; also that the defendant paid the plaintiff rent of said premises which accrued after the tearing up of said rails, with the knowledge on the part of the defendant, before such payment, of the removal of such rails. The allegations in the reply with reference to the former action for the same cause as is claimed as a defense in this action, and with reference to the payment of rent accruing after the alleged eviction, with knowledge of such acts, were admitted on the trial ; also the tearing up the rails, and the receipt of rent by the plaintiff. On the first trial, in October, 1854, the plaintiff recovered a judgment, which was reversed by this court at general term, and a new trial ordered. A new trial was had in October, 1858, before Justice EMOTT, without a jury, who ordered judgment in favor of the plaintiff, from which the defendant appealed. In addition to the facts which appeared on the former trial, it was proved, on the second trial, that the defendant removed a portion of the railway in question, so as to prevent its use, before the plaintiff removed any part thereof. Also, that after the removal of the rails by the plaintiff, the defendant paid the rent of said premises for the

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month of April, 1853, without objection, and subsequently gave his note for the rent of the premises for June, July and August, 1853, part of the rent in question, without objection, which note was not paid. Also that the defendant, when proceeded against by the plaintiff under the statute relating to summary proceedings, to recover possession of the premises in question, on account of non-payment of a portion of the rent claimed in this action to be due, alleged payment of three months' rent claimed to be due, by the note above mentioned, and tendered the amount of the 4th month's rent, also involved in this action, and made no other answer in such proceedings.

C. Frost, for the respondent.

George W. Stevens, for the appellant.

By the Court, LOTT, P. J. It was decided in this case, as reported in 24 *Barbour*, 178, that the rail road mentioned in the pleadings was a part of the demised premises, and that the acts of the plaintiff, as then disclosed, in tearing up and removing the rails from the road, constituted a partial eviction. The opinion of Justice EMOTT, who fully discussed the question, was based on the assumption that the rail road, at the time of the commission of those acts, was in actual use by the defendant, under the lease. A new trial has since been had before him, and upon the facts and circumstances then presented it appeared such was not the case, and he came to the conclusion that the eviction was not established, and ordered judgment for the plaintiff.

The question now to be determined is, whether he was right in that conclusion. The principle established by the decision referred to is, that any intentional and injurious interference by a landlord, with the use or beneficial enjoyment, by the tenant, of any portion of the demised premises, is an eviction. The act must be more than a mere trespass. Ch. J. Jervis, in *Upton v. Townsend*, and *Upton v. Greenless*, (33 *Eng. L. and Eq. Rep.* 212, &c.) says, "It must be something of a more

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permanent character, done by the landlord, with the intention of depriving the tenant of the enjoyment of the whole or a part of the premises, and it is for the jury to say whether the act was done with such intention." The opinion of the other judges was to the same effect. (*See also Cowper*, 242; *Lewis v. Payne*, 4 *Wend.* 426; *Etheridge v. Osborn*, 12 *id.* 529; *Lawrence v. French*, 25 *id.* 443; *Ogilvie v. Hull*, 5 *Hill*, 52; *Bennet v. Bittle*, 4 *Rawle*, 339; *Edgerton v. Page*, 18 *How. Pr. R.* 359; *Notes to 3 Kent's Com.* 9th ed. p. 609.) Testing the case as now presented by this principle, we are of opinion that the judgment below was fully warranted. The tenure of the demised premises commenced on the 1st day of May, 1852. The tenant was "to have the use of the rail road in common with others, and put the same in order above the chemical works, if he wished to use it," and the landlord reserved the use of it to himself also. Now it appears by the evidence that the road was entirely out of repair; that the defendant used part of it, below the chemical works, for the purposes of his business, for a short time, but that he never repaired it, or in any way used the road above those works; that nothing was transported over any portion, after July, 1852, and that it would have cost more to put the same in repair than to cart the defendant's goods where they were wanted. The judge also found as a fact, on sufficient testimony to justify his finding, that the defendant removed a portion of the railway so as to prevent its use, before any part thereof was taken up by the plaintiff. The removal by the defendant took place in the summer, and latter part of the season, in 1852, and that by the plaintiff in April, 1853. The rent reserved by the lease was payable in equal monthly payments, and it was admitted by the defendant that he paid the plaintiff the rent which accrued during the month of May, after the removal of the rails, with knowledge of such removal, before and at the time of payment. It also appeared that when the rent for the months of June, July and August was demanded of the defendant, he said that he would pay it in a few days, and he subsequently

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gave his note therefor, but which has not been paid, and nothing was said by him at any of those interviews about the removal of the rails by the plaintiff.

It is fairly inferable from all these facts and circumstances, not only that the defendant did not wish to use the rail road above the chemical works, but also that he had determined to abandon the use of the whole of it entirely, long before the tearing up and removal of the rails by the plaintiff in April, 1853. His use of it, in fact, ceased as early as August, 1852, and it was never resumed; not only so, but he had by his own acts rendered it incapable of use. There is therefore no ground for the position or pretext that the plaintiff has interfered with the beneficial enjoyment thereof by the defendant. His acts may have amounted to a trespass, for which a compensation in damages has been given, but do not constitute an eviction.

In this view of the case, the evidence, taken subject to exceptions, was admissible, and the judgment based thereon was right, and must be affirmed with costs.

[KINGS GENERAL TERM, February 13, 1860. *Lott, Emott and Brown, Justices.*]

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ELIZABETH J. NEWBERY vs. JOHN R. GARLAND.

In an action to recover damages for fraud and deceit on a sale of stock to the plaintiff, by the defendant through one H. as his agent, and to enforce the plaintiff's lien as vendor upon the land conveyed by her in payment for such stock, it appeared that H. acted only as the agent of the defendant; that the stock purchased by the plaintiff was in fact purchased of the defendant, and that the land conveyed by the plaintiff was received by H. for the defendant, and subsequently, and before suit brought, conveyed to the latter. *Held* that H. was not a necessary party.

An action brought by a married woman, for fraudulent representations, whereby the plaintiff was induced to sell, and part with, certain lands of which she was seised to her separate use, and in which she had a separate estate, and with this separate property to purchase certain worthless stock,

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relates to her separate estate, and is properly brought by her alone, without joining her husband.

Where a party, through the fraud and deceit of another, has sold and conveyed land to the latter, in exchange for worthless stock, he may maintain an action to recover damages for the fraudulent representations whereby he was induced to enter into the contract, without rescinding the contract or restoring the property which he has received under it.

Where the complaint, in such an action, stated a number of representations made by the defendant, as to the property and condition of the company with which he was connected, and as to the value of its stock, and charged that these representations were false, to the knowledge of the defendant, and that they were made with intent to defraud the plaintiff, to induce her to believe that the stock was of great value, and to part with her real estate in exchange for certain shares held by the defendant; and that such representations were uttered in published reports and statements of the condition and property of the company, made and signed by him as one of its officers, and generally and publicly circulated and advertised; *Held* that the action would lie, although the false representations were published to the world, and not made in the course of the dealings with the plaintiff; the defendant being privy to the contract made by the plaintiff, and interested in the sale which was induced by his false representations.

Although it is not alleged in the complaint, in terms, that the defendant's representations were read by, or came to the knowledge of, the plaintiff, yet if it is alleged that she was induced by these representations to purchase a certain number of shares of the stock, and to give in exchange for them a conveyance of her lands, this is sufficient; inasmuch as it involves the knowledge of the defendant's statements by the plaintiff, and connects her contract, and subsequent loss, with those statements, as effect and cause.

APPEAL from an order made at a special term, overruling a demurrer to the complaint. The complaint alleged that on the 16th day of October, 1854, and thenceforth down to the 5th of April, 1855, the plaintiff, the wife of William B. Newbery, was seised and possessed in her own right, to her own sole and separate use, and as and for her own sole and separate property, of certain real estate in the county of Richmond, particularly described. That in and during the year 1854 the defendant was one of the directors and officers, to wit, vice president, and was also engineer and manager, of a certain incorporated company called the Winifrede Mining and Manufacturing Company, duly incorporated under the laws of Virginia. That he had the exclusive charge, management and

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control of divers mines of coal and estates, the property of the company, situated in Virginia, and resided thereat, and was acquainted therewith, and with the value and capabilities of the said mines and estates, &c. ; and that he well knew that the company was not a safe and profitable undertaking, but the contrary ; and that the shares and stock of said company were of no actual value. That in January, 1854, he, the defendant, holding and being interested in the shares or stock of the company to a very large amount, and intending to defraud, deceive and injure the public, and to cause it to be publicly advertised and represented contrary to the fact, that said company was likely to be a safe and profitable undertaking, and also to deceive and defraud the public who might become purchasers of the shares or stock of the company, and in particular of the shares or stock which he held, and was interested in, and to induce them to become such purchasers, falsely, fraudulently and deceitfully procured and caused to be publicly made known and advertised, in and by a certain report made and issued or caused to be made and issued, by him the defendant, as such officer and director, and addressed by him as engineer, as aforesaid, to the stockholders of the company, and distributed among them, divers false and fraudulent statements, tending to induce the public to become such purchasers. These statements were particularly set forth, and their falsity alleged, and the defendant's knowledge of their falsity. It was then alleged that besides the aforesaid representations, the defendant had, at divers other times subsequently, made other false, fraudulent and deceitful representations in the premises, and in particular, in or about the month of February, 1855, did falsely, fraudulently and deceitfully, and with intent as aforesaid, publish, advertise and report that the said Winifrede Mining and Manufacturing Company was about to be amalgamated with a certain other company called the Kanawha Salt Company, on advantageous terms, to wit, terms guaranteeing a dividend of full seven per cent on the stock of the former company ; which reports were false and fraudulent, and

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made with the express intent to defraud the plaintiff, and to induce her to believe that the shares of the company were of great value, the same being then of no value; and especially to induce her to complete for the benefit of the defendant the sale of her said property, then pending. That on the 16th of October, 1854, the defendant then holding and being interested in a large number of shares of the said company, and knowing the same to be of no value, but being desirous of selling or exchanging the same for valuable property of other persons, to be deceived and induced to become purchasers thereof, by such false, fraudulent and deceitful representations, did covertly and deceitfully, and through the medium and agency of one Alexander J. Hamilton, employed by him, the defendant, apply to and induce the plaintiff, then seised and possessed of the premises, before described, as her separate estate, to agree to sell and to execute and deliver an agreement bearing date on the day last mentioned, for the sale of a portion of the said premises, containing over 31 acres, to the said Hamilton, then acting as aforesaid, for the consideration of \$13,375, to be paid to her by the delivery and transfer by the said Hamilton to her, of 850 shares of the capital stock of the said Winifrede Mining and Manufacturing Company, to be taken at the nominal value of \$27.50 for each share, one hundred shares to be delivered and transferred on the execution of such agreement, as a deposit, and the remaining 750 shares to be delivered and transferred on the 31st day of March, 1855, on the execution and delivery of the deed and delivery of possession of the premises. That the plaintiff, induced thereto, by means of the said false, fraudulent and deceitful practices and representations of the defendant, the same being continuing representations, did actually become the purchaser and bearer of the said one hundred shares of the company at the sum of \$27.50 per share, the same being of no real value; and by means and in consequence of being so deceived was induced to enter into, and did enter into and execute the aforesaid agreement, and received the said one hundred shares as a deposit, pursuant to the

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terms thereof. That the said one hundred shares were not the property of Hamilton, but were the property of the defendant, and were transferred and delivered to the plaintiff by him, the defendant, or by some other person or persons by his order and direction, he being interested therein, or having control thereof. That on the 5th of April, 1855, the plaintiff, by a separate agreement, agreed to sell the remainder of her said separate estate, to wit, a parcel containing over six acres, to said Hamilton, so acting as agent for the defendant, for the further price or sum of \$3124. That on the last mentioned day the plaintiff, on the faith of, and in reliance upon, and induced thereto by the aforesaid false, fraudulent and deceitful representations of the defendant, the same being continuing representations, and fully believing the same to be true, and believing that the shares of the Winifrede Mining and Manufacturing Company were of the value of \$27.50 per share, whereas the same were of no value, did, with William B. Newbery, her husband, in pursuance and performance of her aforesaid agreements, absolutely release and convey the premises before described to the said Alexander J. Hamilton, and did accept and receive as the consideration for the conveyance by her of the premises firstly described, the balance of the said 850 shares, mentioned in the agreement of October 16, 1854, 750 shares of the company, and no other consideration whatever, so far as regards such premises, and delivered to Hamilton, acting as aforesaid, possession or the whole of the premises firstly and secondly described. That the said 750 shares were not the property of Hamilton, but were the property of the defendant, and were transferred and delivered to the plaintiff by the latter, or by some other person or persons by his order or direction, the defendant being interested therein, and having control thereof. That the consideration given by Hamilton, for the conveyance of the premises secondly described, was not the money or property of Hamilton, but was also the money and property of the defendant; and the conveyance of all the premises from the plaintiff was so taken by Hamilton, not in his own right, but

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as the agent and on account of the defendant, and on the secret trust and understanding that Hamilton should and would, when thereunto requested, convey the same to Garland. That accordingly, Hamilton and his wife, on the 16th of April, 1855, released and conveyed the whole of the premises to Garland, absolutely, for a pretended consideration of \$27,000, but without any real actual consideration therefor. That the defendant thereupon became and was, and now remains, owner and in possession of the premises. That the aforesaid 850 shares of the said stock, so transferred and delivered to the plaintiff, have since been discovered by her to be, and are, and were, at the time of such transfer and delivery thereof, wholly worthless, and of no value whatsoever; whereby the plaintiff did in fact receive no consideration whatsoever for the conveyance by her of the premises firstly described; and hath by the said false, fraudulent and deceitful acts and representations of the defendant wholly lost and been defrauded of the whole of the purchase money thereof, to wit, \$23,375, and also of the subsequent rents, issues, profits and income of the premises, and hath thereby and otherwise been greatly injured and damaged in the premises, to the amount of \$50,000. The plaintiff also claimed that she was entitled to a lien upon the premises conveyed by her, for the unpaid purchase money, and for all the other damage sustained by her, and to have such lien enforced for her benefit, by and under the direction of the court. The plaintiff demanded judgment for \$50,000 damages, and for costs, and that it might be declared and decreed that she was entitled to a lien on the premises conveyed, for the sum of \$23,375, the unpaid purchase money; also for the subsequent rents and profits, and for the damages sustained by her; and that such lien might be enforced for her benefit; and for an injunction and receiver.

To this complaint the defendant demurred, on the ground that there was a defect of parties; that William B. Newbery should be joined as plaintiff or defendant; and that Alexander J. Hamilton should be joined as defendant. Also, on the

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ground that the complaint did not state facts sufficient to constitute a cause of action.

The demurrer was argued at a special term, before Justice BROWN, who overruled the same, with costs, but with liberty to the defendant to withdraw the same and to put in an answer, on payment of costs.

A. H. Green, for the appellant.

Henry Whittaker, for the plaintiff.

By the Court, EMOTT, J. The demurrer in this case was taken to the whole complaint, and it was properly overruled if the complaint can be sustained in either of two aspects which it presents. We are of opinion that it states a good cause of action for fraud or deceit, and shall not therefore advert to the other branch of the case.

There are two grounds of demurrer stated; one a defect of parties, and the other that there is no cause of action. The defendant claims that Alexander J. Hamilton should have been made a defendant with him. It sufficiently appears, from the complaint; that Hamilton acted only as the agent of the defendant, that the stock purchased by the plaintiff through Hamilton was in fact purchased by the defendant, and that the land conveyed by the plaintiff in payment was received by Hamilton for the defendant, and subsequently, and before the suit, conveyed to the latter. There is, therefore, no reason disclosed for making Hamilton a party to the present action.

The objection that the plaintiff's husband should have joined with her in the action is equally untenable. The suit is for fraudulent representations, whereby the plaintiff was induced to sell and part with certain lands of which she was seised to her separate use, and in which she had a separate estate, and with this separate property to purchase certain worthless stock. This stock which she received for her lands is as much her separate property as they were; and whether the action con-

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earned the one or the other ; whether it be regarded as brought for a fraud affecting the sale or the purchase ; it equally relates to her separate estate, and is properly brought by her alone, under section 114 of the code as it now stands.

Upon the merits, the cause of action is clearly made out by the statements of the complaint. The defendant's counsel is entirely in error in supposing, if we correctly apprehend his argument, that it is necessary for the plaintiff to rescind the contract, and to restore the property which she has received under it, before she can maintain an action for the fraudulent representations whereby she was induced to enter into it. The cases which he cites, and of which *The Matteawan Co. v. Bentley* (13 Barb. 644) is a fair example, are cases where actions were brought to recover property which had been parted with, or its value. Such actions obviously cannot be maintained without a rescission of the contract under which the property was transferred, and a restoration of every thing which has been received under it. But that rule has no application to an action to recover damages for fraudulent representations or deceit in sales or purchases. The cases only need to be stated, to show the distinction.

The complaint states a number of representations made by the defendant as to the property and condition of the company with which he was connected, and as to the value of the stock which the plaintiff was induced to purchase in exchange for her lands. It charges that these representations were false, to the knowledge of the defendant, and that they were made to defraud the plaintiff, to induce her to believe that the stock of this company was of great value, and to part with her real estate in exchange for certain shares held by the defendant. It states these facts, it may be added, with a precision which is unusual in the pleadings which we see under the present system of practice. The complaint does not state that these representations were made *to the plaintiff*, in this particular no doubt following the fact. Nor does it aver expressly that the plaintiff heard, or read, or came to the knowledge of them,

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which perhaps might have been alleged. The only serious question in the case which has occurred to us arises upon these features of it, although it is not pressed, in the elaborate brief submitted by the appellant's counsel. The representations which were made by the defendant are charged to have been uttered in published reports and statements of the condition and property of this company, made and signed by him as one of its officers, and generally and publicly circulated and advertised. It has been held in the court of queen's bench in England, in the case of *Gerhart v. Bates*, (20 *Eng. L. and E. Rep.* 130; 2 *Ellis & Bl.* 476, *S. C.*.) that an action will lie against an officer of a stock company who willfully publishes a false statement of its affairs, whereby another is induced to become a purchaser of its stock, although the defendant had no interest in the sale. Lord Campbell asserts that the action lies, without any privity of contract, and although the parties are entire strangers to each other. A question very similar was presented to the superior court of the city of New York, in *Cross v. Sackett*, (2 *Bosw.* 617,) and although the doctrine of Lord Campbell was severely questioned by eminent counsel, it was substantially accepted by that court. There, also, an action for deceit was sustained, although the defendant had no interest in the stock which the plaintiff was induced to purchase, and reaped no benefit from the contract into which he was persuaded to enter. The doctrine of these cases, and of some others in the English courts to which I shall presently advert, is that a statement made to the public and designed to influence the public, is designed to influence every individual who is interested in its subject matter. If any person is induced to part with his property, or purchase that to which the statement refers, by what it contains, and which would naturally have that influence, the parties who have put it forth are responsible if it be false and fraudulent. Their responsibility is not the less because their representations are addressed to and may influence others besides the plaintiff. They are addressed to him among others, and if designed to mislead, and

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are capable of doing so, they are in effect made to him, if they reach his knowledge, and influence his action. The cases in which it has been held that a party is liable who makes a false and fraudulent representation that another person is worthy of credit, although such recommendation is not addressed to nor intended to defraud any person in particular, proceed upon a principle which will sustain the present action. Wherever there is deceit, designed to injure, and consequent damage, the common law will give an action. (*Addington v. Allen*, 11 Wend. 375. *Com. Dig., Action on the case, Deceit, A. I.*)

It is a question of evidence in such cases what proof will warrant the conclusion that the defendant fraudulently intended and did induce the plaintiff to make the purchase of stock. Such a question cannot be disposed of upon demurrer. The supreme court in the first district seem to have held substantially the same doctrine as the superior court on these points, in *Cazeaux v. Mali*, (25 Barb. 578.)

It is not necessary, however, to go as far as the courts have gone in these cases, to uphold the present complaint, since the defendant in this action was privy to the contract made by the plaintiff, and interested in the sale which was induced by his false representations. The case of *The National Exchange Co. v. Drew* (32 Eng. Law and Eq. p. 1) is in this respect more nearly analogous to the present. That was a case in the house of lords, and the principles upon which their judgment proceeded are very material if not conclusive upon the present question. It was held, in that case, that a joint stock company would be bound by the fraudulent statements of their directors, whereby third parties were induced to contract with them, although such statements were made in reports submitted by the directors to annual meetings of the company. A liability was admitted; the only question was whether it attached to the company, or only to its agents as individuals. In the present case the responsibility is cast upon the individual who made the representations, and the same individual profited by them. Another still more recent case in the house

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of lords is *Bagshaw v. Seymour*, reported in 4 *Com. B. Rep. N. S.* 873, where an action was maintained against a chairman of a company who had procured its shares to be put on the stock list of the exchange, by falsely stating in a prospectus, and in a letter to the committee of the stock exchange, that its capital was paid up. The action was by a person who had been induced to buy some of the shares. The counsel for the plaintiff in error declined to argue the case, and the judgment seems to recognize, as law, the reason given in the printed case of the defendants in error for affirming the judgment, that such a fraudulent representation to the public affords as good a ground of action to a person injured thereby, as if it were made to such person directly. Upon principle as well as upon these authorities, we see no reason why this action should not lie, for the false representations alleged to have been made by the defendant with the fraudulent purpose charged, although they were published to the world, and not made in the course of the dealings with the plaintiff.

The question of the sufficiency of the allegations of the complaint, as to the connection between these statements and the plaintiff's conduct as cause and effect, is merely a question of pleading, and in this respect the plaintiff's complaint is sustained by the cases in the queen's bench and the superior court, to which I have adverted. Although it is not alleged, in terms, that the defendant's representations were read by or came to the knowledge of the plaintiff, yet it is alleged that she was induced by these representations to purchase a certain number of shares of the stock of this company, and to give in exchange for them a conveyance of her lands. This involves the knowledge of the defendant's statements by the plaintiff, and connects her contract and subsequent loss with those statements, as effect and cause. This is sufficient upon principle, and such a pleading is sanctioned by the authorities which I have cited.

The order appealed from is affirmed with costs.

[KINGS GENERAL TERM, February 18, 1860. *Lott, Emott and Brown*, Justices.]

CHARLOTTE B. DILLAYE vs. SMITH A. PARKS.

Where a married woman sues alone, and her disability does not appear upon the face of the complaint, the defendant, if he intends to avail himself of the coverture as a defense, should set it up in his answer.

If the defendant, in his answer, merely denies each and every allegation in the complaint, he waives whatever advantage he might have had by pleading the coverture.

Where a promissory note is indorsed over and delivered to a married woman, by the payee, the property in the note vests in her; and, not proceeding from her husband, it is acquired in the form and mode prescribed by the statute for the acquisition of property by married women, which they are to hold and enjoy as their separate estate.

The possession of, and property in, the note constitute a separate estate therein, which will authorize a married woman to sue, alone, upon such a note.

APP~~EAL~~AL from a judgment entered upon the report of a referee. The action was upon a promissory note.

Dillaye & Cole, for the plaintiff.

H. C. Place, for the defendant.

By the Court, BROWN, J. The disability of the plaintiff, who is a married woman, did not appear upon the face of the complaint. If the defendant, therefore, intended to avail himself of the coverture as a defense to the action, he should have set it up in the answer. She might then have shown, if it was in her power, that the action concerned her separate estate, and the precise question upon which the referee decided in favor of the defendant would have been presented by the pleadings. The defendant, however, in his answer, denied each and every allegation in the complaint only, and thus waived whatever advantage he might have had by pleading the coverture.

The action was brought to recover the money due upon a promissory note dated April 22, 1858, made by the defendant, Smith A. Parks, payable to the order of William A. Jacobia, for \$300, at the City Bank, for value received, three months after date, and by William A. Jacobia indorsed and delivered

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over to the plaintiff. All these facts were admitted to be true upon the trial before the referee, and it also appeared that the plaintiff was a married woman, and there was no proof that she had a separate estate, other than her right of property in the subject matter of the action. Upon this latter ground alone the referee found in favor of the defendant, and judgment was entered accordingly.

The force and validity of the promissory note, and the defendant's obligation to pay it, was not in dispute. By force of the act of 1849, a married woman may take by inheritance, gift, grant or devise, from any person other than her husband, real and personal property, or any interest or estate therein, with the like effect as if she was unmarried, and the same shall not be subject to the disposal of her husband, nor liable for the payment of his debts. The note in question was indorsed over and delivered to the plaintiff after its date, which was the 22d April, 1858, by the payee. The property in the note thereupon vested in her, and as it did not proceed from her husband, it was acquired in the form and mode prescribed by the statute for the acquisition of property by married women, which they are to hold and enjoy as their separate estate. The possession of, and property in, the note constituted the separate estate, for the want of which the referee ordered judgment against the plaintiff.

Upon both grounds I think the referee erred, and the judgment should be reversed and a new trial granted at the circuit, with costs to abide the event.

[KINGS GENERAL TERM, February 18, 1860. *Enott, Lott and Brown, Justices.*]

ELLSWORTH *vs.* CAMPBELL and others.

Where the act of an attorney, in appearing in an action without authority and suffering or confessing a judgment against a person who has not employed him, results in charging an innocent party with a debt which he does not owe, and in creating a lien which may deprive him of his property against his will, and without his fault, it is a wrongful act, and one which the courts are bound to redress.

In such a case the party will not be compelled to seek his remedy against the attorney.

The court will stay all proceedings upon the judgment, but it will preserve the lien which the plaintiff has acquired by his judgment, and give the defendant an opportunity to plead, if he has any plea to make, to the merits.

A PPEAL from an order made at a special term, denying the application of the defendant Campbell to set aside a judgment entered against him for the amount of a deficiency occurring on a sale of mortgaged premises, and for leave to him to come in and defend the suit.

John C. Dimmick, for the plaintiff.

Butler, Evarts & Southmayd, for the defendant.

By the Court, BROWN, J. This is an action commenced in July, 1853, to foreclose two mortgages, one of which is dated November 1st, 1846, and the other on the 10th day of May, 1847, made by the moving party, George W. Campbell, and one Horatio N. Fryatt, upon certain leasehold premises, with the buildings and machinery thereon, situate on the Wallabout road in the city of Brooklyn. No summons, process or papers of any kind, to appear in the action, were personally served upon the defendant Campbell. But Marvin & Prime, two of the attorneys of this court, upon the retainer of the defendant Fryatt, appeared both for him and Campbell, and received a copy of the complaint, which they omitted to answer. Judgment was taken in the usual form, and upon the usual affidavit, for want of an answer, for the foreclosure and sale of the mortgaged premises, and that the sheriff in his report

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of the sale should specify the amount of the deficiency, if any, and that the plaintiff should have judgment against George W. Campbell and Horatio N. Fryatt for such deficiency.

The judgment was executed by the sheriff of the county of Kings, and the mortgaged premises sold for the sum of \$7000, and the deficiency reported by the sheriff was \$4879.15, for which a personal judgment was entered and docketed against the defendants Campbell and Fryatt, in the office of the clerk of the county of Kings, on the 22d day of November, 1855. The defendants Campbell and Fryatt had been copartners in business under the name of Fryatt & Campbell, and were such when the mortgages were made. But afterwards, and before the execution of the deed of release to which I shall presently refer, the connection was dissolved and the copartnership ceased. On the 10th July, 1851, the defendant Campbell, in pursuance of the provisions of the act for the relief of partners and joint debtors, passed April 18, 1838, made a separate compromise of the joint indebtedness of Fryatt & Campbell with certain creditors of the firm, including the plaintiff. Thereupon the plaintiff, in pursuance of such compromise, by an instrument bearing date July 10th, 1851, duly executed under his hand and seal, released and discharged the defendant Campbell from all debts, demands, claims and liabilities which the plaintiff had against him jointly with his late partner, Fryatt, and did also by the said written instrument covenant not to sue, implead or vex the defendant Campbell by reason of any such debts, claims or demands. The defendant Fryatt had no authority or request of any kind from Campbell to employ Marvin & Prime, or any other attorney, to appear for him in the action, and whatever was done was entirely without the knowledge, assent or approbation of Campbell. He had no knowledge of the existence of the judgment against him until about the 1st of June, 1857, when he discovered it in consequence of making a search for judgments in the clerk's office. He thereupon applied to the plaintiff to release the judgment and to discharge his property from the lien thereof, which the

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plaintiff refused to do. He then made a motion at the special term for an order vacating the judgment entered against him for the deficiency, which was denied, and hence this appeal.

As there is no dispute about the facts upon which the defendant Campbell claims to be relieved, the special term doubtless adopted and acted upon the idea that the judgment was regular, and the remedy, if any, was against the attorneys who compromised him without authority. There are decisions in England and in some of the states of this confederacy, which hold that although the attorney has acted without authority, and entered the appearance of a party with or without process having been served upon him, it is a good appearance, and the judgment and proceedings regular, and the remedy of the injured party is against the attorney, and not by an application to the court to be relieved against his acts in the action itself. The rule is said to be subject to this modification, that if the attorney be insolvent and unable to respond to the party injured, the court will set aside the judgment; for otherwise he has no remedy and might be undone by that means. This qualification of the rule shows that it is vicious in principle. The act of an attorney is either right and legal in itself, and then it should be upheld, or it is wrong and illegal, and should be set aside irrespective of extrinsic matter. The ability or inability of the attorney to respond has nothing to do with the question; for to leave the injured party without relief until he should pursue and exhaust his remedy against the attorney, might in many cases result in the destruction of his rights and the loss of his property. The act of the attorney in appearing in an action without authority, and suffering or confessing a judgment against a person who has not employed him, may result, as in the present case, in charging an innocent party with a debt which he does not owe, and in creating a lien which may deprive him of his property against his will and without his fault. It is therefore a wrongful act, and one which the courts are bound to redress. The law of this state

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has been administered by a class of men too conscientious and too enlightened not to feel the force of this view ; for while recognizing the existence and force of the rule as given in some of the English authorities, they have modified it and qualified its application so as to disarm it of its most offensive features. In *Denton v. Noyes*, (6 *John*. 296,) Chief Justice Kent says : " This rule of law, though perfectly well settled, would oftentimes be unjust in its operation if it was not so restrained as to save the party who may be affected by it from injury. It was therefore wisely laid down by the king's bench in the time of Lord Holt, (1 *Salk*. 88,) that if the attorney for the defendant be not responsible or perfectly competent to answer to his assumed client, they would relieve the party, against the judgment, for otherwise a defendant might be undone. I am willing to go still further, and in every such case to let the defendant in to a defense to the suit." I am disposed, therefore, to prevent all possible injury to the defendant, and at the same time to save the plaintiff from harm. This can be done by preserving the lien which the plaintiffs have acquired by their judgment and giving the defendant an opportunity to plead, if he has any plea to make to the merits. The same course was adopted in the case of *Grazebrook v. McCreddie*, (9 *Wend*. 437,) which was an action against copartners, the process served upon one defendant only, who employed an attorney, and the latter gave a cognovit for both. So also in *Blodget v. Conklin & Arnold*, (9 *How. Pr. Rep*. 442,) which was a case against joint debtors and the summons served upon both, and a consent by an attorney employed by one of the defendants, that judgment be taken against both, an order was granted, allowing Conkling, one of the defendants, to answer and defend the action. Such must now be deemed the settled practice of the court. It will always afford adequate relief to a defendant, while at the same time it protects a plaintiff who has obtained a judgment, as far as he can be protected, from some of the injurious consequences to which he might be exposed by the delay.

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The order made at the special term must be reversed, and an order entered staying all proceedings upon the judgment for the deficiency against the defendant George W. Campbell, until the further order of the court. Within twenty days after the service of a copy of the order to be entered hereon, the plaintiff shall deliver to the attorneys for the defendant Campbell a copy of the complaint in this action, and to so much thereof as claims to recover from him any part of the mortgage debt he shall put in his answer within the usual time, and the issue thus formed shall then proceed to a determination in the usual manner. Ten dollars, the costs of the motion at the special term, and ten dollars, the costs of this appeal, are awarded to the defendant George W. Campbell, if he shall finally succeed in his defense. All other directions are reserved until the further order of the court.

[KINGS GENERAL TERM, February 18, 1860. *Lott, Emmott and Brown, Justices.*]

THE PEOPLE *ex rel.* The Hudson River Rail Road Company
vs. PIERCE and others.

Whether a rail road corporation is to be considered as resident, for purposes of taxation or otherwise, in each county through which its road runs, or only in the city where its principal business office is situated? *Quare.*

Under the first section of the act of 1837, which directs commissioners of highways in apportioning the residue of the highway labor to be performed in their town, after assessing one day's work upon every male inhabitant of full age, "to include among *the inhabitants* of such town, among whom such residue is to be apportioned, all moneyed or stock corporations which shall appear on the last assessment roll of their town to have been assessed therein," the commissioners must follow the previous action of the assessors. They are not to assess such corporations as are situated in their town, or such as may properly be considered inhabitants of such town. They are to take the last assessment roll for a guide, and to include in their assessment every corporation which they find assessed therein; and they cannot tax,

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by name, as an inhabitant of the town, any corporation which is not so assessed upon that roll.

The act intended these corporations should be included among, and treated as inhabitants, for all its purposes.

CERTIORARI to remove the proceedings of the defendants, as commissioners of highways of the town of Cortlandt, Westchester county, in assessing the Hudson River Rail Road Company, for highway labor, and the subsequent proceedings of the overseer of the district.

Thomas M. North, for the relators.

C. Frost, for the defendants.

By the Court, EMOTT, J. This certiorari brings up the proceedings of the commissioners of highways of the town of Cortlandt, in Westchester county, in assessing the relators for highway labor, and the subsequent proceedings of the overseer of the district to which the amount of the tax thus imposed was assigned. The commissioners assessed the Hudson River Rail Road Company as a stock corporation, under the power conferred by sec. 1 of chap. 431 of the laws of 1837. They return that the company are taxed by name upon the last assessment roll of the town of Cortlandt, for real estate owned therein, and that the land so owned by them was not assessed as land of a non-resident owner. It is also stated that the principal place of business of the company is in New York city, and it is intended to be conceded or inferred that the lands thus taxed are a portion of the track and certain depot grounds on the route of the road, which passes through the town. The relators contend that this assessment for highway labor is erroneous and void, and that the commissioners should have assessed the lands owned by the company as lands of a non-resident owner, according to subdivision 3 of section 24, 1 R. S. 506.

The question whether a rail road corporation is to be con-

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sidered as resident, for purposes of taxation or otherwise, in each county through which its road runs, or only in the city where its principal business office is situated, may perhaps be involved in some doubt. Residence, or inhabitancy, are terms which obviously can only be used of such a corporation in a qualified or accommodated sense. The term domicile, which has a somewhat different meaning, involves still more the idea of purpose or intention, and is, I suppose, not properly applicable to such an artificial being. Still the question whether such corporations are to be treated as residents or non-residents, occurs in various shapes. It is material in reference to taxation, and it arises in applying the statute regulating process from inferior courts, and the jurisdiction of those courts.

The proper mode of taxing the lands of rail road corporations for highway labor, as well as for the general purposes of government, must undoubtedly be ultimately determined by ascertaining whether they are to be regarded as resident or non-resident owners of their lands, in the various towns through which their tracks are laid. But I have been unable to see how we can reach that question in the present case. The first section of the act of 1837, under which the defendants made the assessment now complained of, directs these officers in apportioning the residue of the highway labor to be performed in their town, after assessing one day's work upon every male inhabitant of full age, "to include among the *inhabitants* of such town, among whom such residue is to be apportioned, all moneyed or stock corporations which shall appear on the last assessment roll of their town to have been assessed therein." The rule of action for the commissioners of highways, therefore, is to follow the previous action of the assessors. They are not to assess such corporations as are situated in their town, or such as may properly be considered inhabitants of such town. They are to take the last assessment roll for a guide, and to include in their assessment every corporation which they find assessed therein. These corporations the act intends shall be included among and treated as inhab-

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itants, for all its purposes. The highway law itself affords no rule or principle for discriminating between such corporations as are and such as are not taxable in the towns, nor between such portions of the property of these corporations as may or may not be thus taxable. It affords no data by which we can decide whether a rail road corporation may properly be deemed to have a residence in all or any of the towns through which its road passes. On the other hand, the laws regulating the assessment and collection of general taxes do contain directions and regulations as to the mode of taxing such corporations. The highway law does not even direct the commissioners to include in their assessment such corporations, or such corporate property as ought to be or to have been taxed in the town and upon the last preceding assessment. These officers are to be guided by the fact, not the right. The question of right is to be determined by one set of officers only, the assessors, and is not left open for independent and possibly conflicting action by two assessing boards in the case of the two taxes.

If we were disposed or felt justified in considering the merits of the main question which was somewhat argued at the bar, that of the residence of the relators, we could only do so in reference to the assessment of the general tax. If we could say that the statute meant that the commissioners should include in their assessment such corporations as were rightly and legally taxable in their town, we must refer that question to the general tax, and we should be brought to the question how the lands of this company ought to be taxed by the town assessors. If it be not the corporations which were actually and as a matter of fact upon the last assessment roll, which are to be taxed as inhabitants of the town for highway purposes, it can only be corporations which properly and legally appeared upon that roll which can be so included. I can discover no landmarks by which our investigation could proceed but these.

But this question the counsel for the relators declined to argue, and as it was intimated that it was to be presented to

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us directly, in review of the proceedings of town assessors in the case of the same company, it is proper that we should reserve any discussion of it at present. We do so the more readily because, as already intimated, we cannot consider the question brought before us by the present proceeding. This return states that the relators were assessed by name, as a corporation, upon the last assessment roll of the town of Cortlandt, and even if it also states facts which would show that they were improperly taxed in that roll, still the rule for the defendants was whether the relators appeared in the roll, not whether they ought to have appeared there. The error, if there be one, can only be reached by correcting the town assessment. Then the commissioners of highways will be bound to follow it; or rather they cannot tax by name, as an inhabitant of the town, any corporation which is not so assessed upon that assessment list. But while the relators appeared upon the town assessment roll in the manner stated in this return, the defendants were not only justified but required to assess their property in the manner in which they imposed this tax.

The proceedings which this writ brings before us must be affirmed, with costs.

[KINGS GENERAL TERM, February 13, 1860. *Loft, Emott and Brown*, Justices.]

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BEARD vs. THE CITY OF BROOKLYN.

The authority given by its charter to the corporation of the city of Brooklyn, to open and grade streets and avenues, is a most vital and valuable part of the sovereign power of the state, and the common council is accountable for the manner of its exercise.

It cannot institute proceedings to open and grade streets &c., and through mere negligence and inattention leave them imperfect and incomplete, to the detriment and injury of individuals.

In making contracts with others, in execution of the powers bestowed upon

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the corporation, no liability will be created, so long as the corporation acts within the scope of its authority, and with usual and reasonable diligence. But it cannot, with impunity, enter into contracts with individuals, by which they are induced to expend their labor and substance in works of public improvement, and then refuse, or negligently omit, to employ the means given it by law, for their recompense and reimbursement.

Thus, if, after having entered into a contract with an individual for graduating, regulating and forming an arch in an avenue of the city, and the contract has been fully performed by the contractor, the common council neglects to lay, confirm and collect the assessment for the cost of the work, an action, substantially on the case for negligence, will lie against the corporation, in favor of the contractor.

APPPEAL from a judgment of the city court of Brooklyn. The action was brought to recover a balance claimed to be due to the plaintiff, as assignee of James Collins, on a contract made by said Collins with the defendants, for graduating, regulating and forming an arch in Clinton avenue, from Wallabout road to the bulkhead. The complaint alleged that the defendants agreed to cause due diligence to be used in laying, confirming and collecting the assessment for the cost of the work, but that they failed to do so; whereby the said assessment has not yet been collected. The answer contained a general denial and alleged a payment in full. The action was referred to George G. Reynolds, Esq., as referee, who reported in favor of the plaintiff, on the ground that the defendants might, with due diligence, have collected the whole assessment on or before the 15th of May, 1849, and that they did not use due diligence in collecting the same. At the close of the plaintiff's testimony the defendants moved for a nonsuit, upon these grounds:

1. Because no contract had been shown binding upon the city.
2. Because by the contract offered in evidence the defendants were not bound to use any diligence in collecting the amounts.
3. Because the proper remedy of the plaintiffs was by mandamus and not by action.
4. Because the contractor agreed to receive payment as the

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assessment was collected, and it was not shown that any assessments had been collected.

5. Because the defendants were not liable for the failure of the proper officers to do their duty in the matter of collecting the assessment.

6. Because the plaintiffs had failed to establish a cause of action against the defendants.

Motion was denied by the referee, and the defendants excepted.

A. McCue, for the appellants. I. The referee erred in denying defendants' motion. No contract was shown by which any general liability was incurred by the city of Brooklyn. The contract was never in fact executed by the city, but only by the contractor; and the latter agreed to receive payment for his work as the money should be collected from time to time on the assessment therefor. It was admitted by the plaintiff that all the assessments received into the city treasury had been paid to the contractor, or upon his order, as received, and that the balance of the assessment had not been collected by the defendants. (*Hunt v. City of Utica*, 18 N. Y. R. 442.)

II. The referee also erred, because by the contract offered in evidence the defendants were not bound to use any diligence in collecting the assessment.

III. The referee also erred, because the plaintiff entirely failed to prove any negligence on the part of the defendants. The assessment was confirmed in May, 1848. A warrant for the collection of the same was issued in July, 1848. The warrant has never been returned, and in March, 1854, the common council directed the collector of taxes and assessments to proceed forthwith with the collection of the assessment. The defendants have therefore discharged all their duty in the premises, and "have put the necessary machinery in motion." (*McCullough v. Mayor of Brooklyn*, 23 Wend. 458. *Lake v. Trustees of Williamsburgh*, 4 Denio, 520. *Hunt v. City*

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of *Utica*, 23 *Barb.* 398, reviewing the case of *Cummings v. Mayor of Brooklyn*, 11 *Paige*, 596.)

IV. The referee also erred, because the negligence, if any, was not on the part of the defendants, but in their officers, intrusted by law with the performance of specific duties, and for whose malfeasance or nonfeasance the corporation, as such, is not responsible. (*Martin v. City of Brooklyn*, 1 *Hill*, 545. *Approved of in 1 Kern.* 392.)

V. The referee also erred, because the plaintiff had failed to establish a cause of action against the defendants. The common council had no authority to direct the street commissioner to enter into any contract for an improvement, the cost of which was made by the charter the subject of a local assessment, which contract could, in any event, become a general charge against the property of the corporation. The charter prescribed the powers of the common council, beyond which it could not go; and if it did, the members thereof would act as individuals, and would be liable accordingly. (*Ouyler v. Trustees of Rochester*, 12 *Wend.* 168, affirmed in *Mayor of Albany v. Cunliff*, 2 *Comst.* 178. *Hunt v. City of Utica*, 18 *N. Y. Rep.* 442. *Baker v. City of Utica*, 19 *id.* 328, and cases cited under 3d point.)

VI. For the reasons before stated, the findings of the referee, numbered respectively 1, 2, 4 and 5, relative to the making of the contract, the performance thereof by the plaintiff, and that the defendants might, with due diligence, have collected the assessment on or before the 15th of May, 1849, but that they had not used due diligence, were erroneous.

VII. The finding of the referee, in respect to the interest upon the plaintiff's claim, was also erroneous. The payment of the sum of \$2092, as interest, was made by the comptroller, without authority. No interest was due upon the contract. The contract price was to be paid, as collected from time to time, on the assessment. This excludes the idea of any interest. The defendants should be credited with this amount,

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and, this being done, the plaintiff will appear to have been overpaid.

D. P. Barnard, for the respondent. I. The referee was fully justified in finding that with due diligence the assessment might have been collected in one year from the confirmation.

II. The power to direct the grading of an avenue was a judicial power, for which the defendants are not responsible either for directing or omitting to direct the act to be done. But when they have exercised the power, and directed the contract to be made, they are in duty bound to take all necessary measures to have the assessment collected; and if they neglect to do so, they are liable to an action on the case. (*McCullough v. Mayor &c. of Brooklyn*, 23 *Wend.* 458, *Brady v. The Same*, 1 *Barb. S. C. Rep.* 584. *Hunt v. City of Utica*, 23 *id.* 390; *S. C.*, 18 *N. Y. Rep.* 442.)

III. When a municipal corporation, for a consideration received from the sovereign power, has become bound by agreement, either expressed or implied, to do certain things, such corporation is liable, in case of neglect to perform the agreement, not only to a public prosecution by indictment, but to a private action at the suit of every person injured by such neglect. (*People v. Corp. of Albany*, 11 *Wend.* 539. *Western v. Mayor of Brooklyn*, 23 *id.* 334. *Mayor of New York v. Furze*, 3 *Hill*, 612. *The Same v. Bailey*, 2 *Denio*, 433. *Morrey v. Town of Newfane*, 8 *Barb.* 645. *Hickok v. Trustees of Plattsburgh*, 15 *id.* 427. *Rochester White Lead Co. v. City of Rochester*, 3 *Comst.* 463. *Hutson v. Mayor &c. of New York*, 5 *Selden*, 163. *Griffin v. The Same*, *Id.* 456. *Conrad v. Trustees of Ithaca*, 16 *N. Y. Rep.* 158. *Adsit v. Brady*, 4 *Hill*, 630.)

IV. Corporations are liable for injuries to third persons resulting from the negligence of persons employed by officers of the corporation in the performance of their public duties. (*Lloyd*

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v. *Mayor of New York*, 1 *Seld.* 369. *Howell v. City of Buffalo*, 15 *N. Y. Rep.* 512.)

V. Actions have been sustained to recover moneys payable by a local assessment. (*Stafford v. Mayor &c. of Albany*, 6 *John.* 1; 7 *id.* 541. *Hawkins v. Trustees &c. of Rochester*, 1 *Wend.* 53. *Kelley v. Mayor &c. of Brooklyn*, 4 *Hill*, 263. *Brady v. The Same*, 1 *Barb. S. C. Rep.* 584.)

VI. This was not a proper case for a mandamus. The plaintiff has an adequate remedy by action. A mandamus would not compensate for damages sustained. (*Shipley v. Mechanics' Bank*, 10 *John.* 484. *Boyce v. Russell*, 2 *Cowen*, 444. *Ex parte Fireman's Ins. Co.* 6 *Hill*, 243. *Ex parte Lynch*, 2 *id.* 45. *People v. Mayor &c. of N. Y.*, 10 *Wend.* 393. 25 *id.* 680, *S. C.* *People v. Supervisors of Chenango*, 1 *Kern.* 563.)

By the Court, BROWN, J. On the 14th of October, 1846, James Collins, the plaintiff's assignor, entered into a written contract with the defendant to grade, regulate and form an arch in Clinton avenue, from the Wallabout road to the bulkhead in the city of Brooklyn, in the manner prescribed in the contract. The contractor was to receive payment for the work as the money should be collected, from time to time, on the assessment therefor. This contract was made under the act to incorporate the city of Brooklyn, passed April 8th, 1834, the 40th section of which gives the common council power to cause all streets to be graded, &c. The expense is to be charged upon the owners and occupants of the lands benefited thereby, and the assessments are to be paid into the treasury within thirty days, pursuant to section two of the act of the 28th of March, 1836. If not paid within that time, a warrant shall be issued to the collector, to collect the same, in the like manner as warrants to the collectors of towns under the general law for the collection of taxes therein. This warrant is to be made returnable in 120 days. Upon the return of the warrant with the certificate upon oath of the non-payment of any

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assessment, the common council are to advertise and sell the lands charged with the payment thereof, for the lowest term of years at which any person will take the same and pay the assessment with the interest and the charges. The period of time required for the consummation of these proceedings is less than one year. It appeared from the proof taken before the referee, that the assessments for the expenses of the work were duly made and confirmed on the 15th May, 1848, and the warrant for the collection of the same was issued to the collector in July, 1848. The work was completed by the contractor, as appeared by the certificate of the city surveyor, March 19th, 1849. The original warrant has not been returned, and no measures were taken by the common council to enforce the collection of the assessments, except a resolution of the common council, passed March 13th, 1854, directing the collector of taxes and assessments to proceed forthwith to collect the sums due for the work, and that a warrant for the collection of the same issue to the proper officers. No warrant, however, was issued under the resolution. Such moneys as had been collected and paid into the treasury had been paid over to the contractor, which consisted mainly of the money collected from the government at Washington; but a very considerable sum still remained due and unpaid to the collector. These constituted the principal facts of the case, which is substantially an action on the case for negligence, tried before a referee, who made a report in favor of the plaintiff, upon which judgment was entered in the city court of Brooklyn, and from which the defendant has appealed.

No one will think, after the decisions of this court in *McCullough v. The Mayor &c. of the City of Brooklyn*, (23 Wend. 458,) and *Lake v. The Trustees of Williamsburgh*, (4 Denio, 520,) that the defendants in this action are primarily liable for the payment of the money due to the plaintiff upon the contract. The common council is one of the contracting parties, but it does not covenant or agree to pay any money for the labor and services to be performed on the street. They are

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parties to the contract in execution of a statute, as the agents of the owners of the land benefited by the improvement, and not as strictly the agents and representatives of the city. The work is for the special benefit and improvement of such lands, and the expenses are a special charge thereon, and not upon the city at large, or its treasury. "No legal duty rests upon the corporation," says the court in the last named case, "beyond that of setting the machinery in motion and making a right application of the funds when received." There is also the further duty of keeping the machinery in motion until the improvement is completed, and the moneys realized to compensate those who may have been employed and expended their substance and labor for that end. "If the common council," say the court, in *McCullough v. The Mayor of Brooklyn*, "has neglected that duty, or has been wanting in diligence, an action on the case would perhaps lie in favor of any one who like the plaintiff would be entitled to the money when collected. But a mandamus would be the more appropriate remedy. Although, as a general rule, a mandamus will not lie when the party has another remedy, it is not universally true in relation to corporations and ministerial officers." The contract in the present case is studiously silent in regard to the duties and obligations of the common council. It does not even say that it will proceed with reasonable diligence to make and collect the assessments. It has duties and obligations, nevertheless, which are to be implied from the nature of the transaction and the objects to be accomplished by the statutes under which it acts. These objects are the opening and the improving of streets, within the city limits, upon just and equitable principles. These improvements involve large expenditures of moneys, and unless the law imposed duties upon the corporate authorities adequate to the due execution of the laws, and the collection of the necessary means, the improvements could not be made and the laws would fail to be executed. These acts for the opening and improvement of streets and avenues within the bounds of municipal corporations are acts

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of public concern. They promote the health, the comfort, the convenience and the necessary business of the inhabitants, and thus concern the public welfare. When the public interest calls for the execution of the powers conferred by these statutes, the corporation are not at liberty to withhold it. The exercise of the power becomes a duty which the corporation are bound to fulfill. (*The Mayor of New York v. Furze, 3 Hill, 612.*) In the case of *West v. The Trustees of the Village of Brockport*, decided by Judge Selden at the special term, and reported in a note in the 16th *New York Reports*, 161, and which received the sanction of the court of appeals, we have this exposition of the duties and obligations of individuals as well as corporations: "That whenever an individual or a corporation, for a consideration received from the sovereign power, has become bound by covenant or agreement, express or implied, to do certain things, such individual or corporation is liable, in case of neglect to perform such covenant, not only to a public prosecution by indictment, but to a private action at the suit of any person injured by such neglect. In all such cases the contract made with the sovereign power is deemed to enure to the benefit of every individual interested in its performance." The action was against the trustees, for the negligent and careless construction of a platform in a public street, by which the plaintiff was injured; the trustees having power given them by statute "to open, improve, ornament, construct and repair streets, alleys and sidewalks." The plaintiff was nonsuited at the trial, and the nonsuit was afterwards set aside upon the principle which I have extracted from the opinion. (*See also Conrad v. Trustees of Ithaca, 16 N. Y. Rep. 158; Hunt v. The City of Utica, 18 id. 442.*) The authority given to the corporation of the city of Brooklyn, by the statutes to which I have referred, is a most vital and valuable part of the sovereign power of the state, for it is, amongst other things, the right to take private property for public use under the law of eminent domain. The common council are therefore accountable for the manner of its

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exercise. It cannot institute proceedings to open and grade streets and avenues, and through mere negligence and inattention leave them imperfect and incomplete, to the detriment and injury of individuals. In making contracts with others, in execution of the powers bestowed upon it, no liability will be created, so long as it acts within the scope of its authority, and with usual and reasonable diligence. But it cannot with impunity enter into contracts with individuals by which they are induced to expend their labor and substance in works of public improvement, and then refuse or negligently omit to employ the means given it by law for their recompense and reimbursement. Collins, the contractor, according to the certificate of the city surveyor, executed his part of the contract with reasonable fidelity and dispatch. No fault is imputed to him. It is not claimed or pretended that the lands benefited by the work are not of sufficient value, if sold, to pay the expenses incurred, for no effort or attempt has been made to bring them to a sale. The collector's warrant, with the return thereto under oath, has not even been filed in the proper office, so that a valid sale of the lands charged could have taken place. The contractor has no power over the collector to enforce the return of the warrant, nor has he any authority to issue a new warrant. He cannot sell the lands himself, for the satisfaction of his undisputed claim. In short he is remediless, because the legislature has delegated the power necessary to collect the money to the common council, and to no one else. The negligent omission of the defendant is too manifest to admit of any doubt, and the authorities to which I have referred are decisive in favor of the plaintiff's right to recover.

In addition to the sum of money assessed to the general government, the street commissioner collected from it the sum of \$2092 for interest. This sum was by a resolution of the common council paid to the contractor as interest upon his claim, in consideration of the delay in the payment. The counsel for the city now claim that the referee erred in not charging this sum as a payment upon the principal sum due

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the contractor for the work. In this view I do not concur. The common council have no interest in this affair, except to execute the laws. As has been said before, it is the agent of the parties interested. It received the \$2092 as interest, and very properly paid it over as such. What else could be conscientiously or legally done with it?

The judgment should be affirmed.

[KINGS GENERAL TERM, February 13, 1859. *Lott, Emott and Brown*, Justices.]

RICHARDSON vs. THE CITY OF BROOKLYN.

In an action by the holder of a certificate issued by the city of Brooklyn, which stated that there would be due to B. or P. or order, from the city, on the contract for grading and paving W. avenue, \$2000, payable on surrender of the certificate when the assessment for said improvement should have been collected and paid into the city treasury; *Held* that it was erroneous for the judge to instruct the jury that they might regard the certificate as a contract on the part of the city to advance a portion of the money in advance of the completion of the work; and that if they thought, from the evidence, the corporation had not caused due diligence to be used in collecting the assessment, whereby the assessment had not been collected, sufficient to pay the plaintiff's claim, the plaintiff was entitled to a verdict.

A PPEAL from a judgment of the city court of Brooklyn. The opinion of the court contains the material facts.

D. P. Barnard, for the plaintiff.

Alexander McCue, for the defendant.

By the Court, BROWN, J. The plaintiff is the holder and assignee of a certificate issued by the defendant to James Bennett or R. P. Perrin, cashier, or order, for work done by the former on a contract for grading and paving Washington avenue in the city of Brooklyn. The certificate is in the words following:

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"No. 713. \$2000. This certifies that there will be due from the city of Brooklyn to James Bennett or R. P. Perrin, cashier, or order, on contract for Washington avenue grading and paving from Douglas street to city line, the sum of two thousand dollars, payable upon surrender of this certificate when the assessment for said improvements shall have been collected and paid into the city treasury.

In witness whereof, these presents are executed this 17th day of December, 1855. GEORGE HALL, Mayor.

S. J. BURR, Assistant City Clerk.

Countersigned, WILLIAM B. LEWIS, Comptroller." [L. s.]

The form of the action is for negligence in not collecting the assessments out of which the certificate was payable, with reasonable diligence.

At the trial in the city court of Brooklyn, the plaintiff produced and proved the certificate, with its delivery over to him duly indorsed by the payee. He also proved and produced the contract in writing between James Bennett, the contractor, and the common council, for grading and paving the street. Also a demand of payment from the street commissioner and comptroller of the city, before the commencement of the action, and that there was no money in the hands of the comptroller for its payment. Also the assessment roll for the improvement, which was confirmed by the common council June 5th, 1854, with a resolution of the latter, passed January 25th, 1855, requiring the collector of taxes and assessments to cause to be published once in every three months a list of the unpaid assessments. The plaintiff then rested.

The defendant moved for a nonsuit, on the ground that the proof did not establish the laches of the defendant, which motion was denied. It was then proved that in October, 1855, the whole property charged with the expenses of the improvement was regularly advertised for sale and sold. All the lots or parcels, except twelve in number, were sold to bona fide purchasers; and these twelve lots were struck off, at the sale, to James Bennett, the contractor, as purchaser, who did not pay

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the purchase money. It was also proved that the street commissioner was then proceeding to sell, for the unpaid assessments, the twelve lots bid in by Bennett, which unpaid assessments with the expenses amounted to the sum of \$4500. This closed the evidence on both sides.

In the case of *Beard v. The City of Brooklyn*, decided at this term, I have fully expressed my views of the duties, obligations and liabilities of municipal corporations, and of the rights of contractors, under circumstances similar to those disclosed by the evidence in this action, and I need not repeat them here. The proof of negligence on the part of the city in this action is certainly very slight, and hardly sufficient to sustain a recovery. It is not with the merits that I propose to deal now, for there must, I think, be a new trial for misdirection of the court.

The certificate is not negotiable paper. It is payable to one of the two persons therein named, but is not for the payment of money absolutely. Nor is it to pay at a given time. It certifies, not that there is due, but that there will be due, to the persons named, from the city of Brooklyn, on the contract for Washington avenue grading and paving, \$2000, payable on surrender of the certificate when the assessments for said improvement shall have been collected and paid into the city treasury. Yet in the face of this plain and explicit written declaration of the makers of the certificate that it was payable only when the assessments for the Washington avenue improvement were collected and paid into the city treasury, the jury were directed that they might regard it as a contract on the part of the city to advance a portion of the money in advance of the completion of the work, and if they thought from the evidence the defendant had not used due diligence in collecting the assessments, whereby they had not collected sufficient to pay the plaintiff's claim, the plaintiff was entitled to a verdict. To this part of the charge the defendant excepted, and I think the exception well taken. It was an error to tell the jury they might regard the contract to be other or different

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from that expressed upon the face of the certificate. And when in the same paragraph or sentence they were also told to determine the question of due diligence in collecting the assessments, they could not fail to determine it in reference to a contract "to advance a portion of the money in advance of the completion of the work." It will be remembered, in this connection, that the certificate is for \$2000, and the sum with the expenses charged upon the twelve parcels purchased by Bennett, the contractor, before the certificate was issued and for which he did not pay, amounts to about (the witness says) \$4500. No jury could possibly have found the absence of due diligence, or the presence of negligence, without reference to "a contract on the part of the city to advance a portion of the money in advance of the completion of the work."

For these reasons I think the judgment should be reversed and a new trial granted, with costs to abide the event.

[KINGS GENERAL TERM, February 13, 1860. *Lott, Emott and Brown, Justices.*]

GENTER vs. MORRISON.

Where a deed is not acknowledged previous to delivery, it must be attested by at least one witness; or it will not take effect, as against an incumbrancer or purchaser, until it is acknowledged.

The presumption that an instrument was executed and delivered at the time it bears date does not hold in respect to deeds in fee, unattested and unacknowledged.

Whether such a deed was actually executed and delivered at the time it bears date, or not, is a question of fact for the jury; and if the evidence upon it is conflicting, the case should be submitted to them.

THIS was an action brought to recover the possession of a house and lot, situate in Springfield, Otsego county. The plaintiff claimed and proved title by virtue of a sheriff's deed, conveying to him all the right and title of Benjamin Barrett

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to the premises, dated January 6, 1854. The defendant claimed the right to the possession of the premises, under and by virtue of a quitclaim deed from Barrett to one Calvin P. Smith, dated June 14, 1848. The deed was delivered to Smith, and he entered into possession of the premises. He subsequently rented the same to the defendant, and the latter had ever since continued to occupy the premises, under Smith. The deed to Smith was not acknowledged previous to its delivery, nor had it any attesting witness. When it was produced in evidence, on the trial, it had indorsed upon it the following certificate of acknowledgment:

"Otsego county, ss: On this 24th day of April, 1852, before me personally came Robert Morrison, subscribing witness to the within conveyance, to me known, who being by me duly sworn, did depose and say that he resided in the town of Springfield, in said county; that he knew Benjamin Barrett, the individual described in and who executed the said conveyance; that he was present and saw the said Benjamin Barrett sign, seal and deliver the same as and for his act and deed, and that the said Benjamin Barrett then acknowledged the execution thereof; whereupon the said Robert Morrison became the subscribing witness thereto, at the request of the said Benjamin Barrett, and on the day of the date thereof.

ALBERT COTES, Justice of Otsego county."

The name of the defendant, Morrison, was also subscribed, at the foot of the attestation clause, as an attesting witness to the execution and delivery of the deed; but it appeared that it was not so subscribed at the time the deed was executed, nor until the 12th day of April, 1852. The plaintiff, on the trial, claimed that the deed from Barrett to Smith was a forged deed, and the defendant proved by eight witnesses that the deed was the deed of Barrett, and that the body of the deed as well as the signature was in Barrett's handwriting. The plaintiff gave no evidence against the genuineness of the deed. After the evidence was closed, the plaintiff's counsel moved the court to strike out the evidence of said deed from Barrett

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to Smith, and objected to the same on the ground that the deed was not acknowledged or properly proved, so as to entitle it to be read in evidence. Also, that the execution and delivery of the deed was not attested by a witness as required by statute, and was therefore void and of no effect against the plaintiff, *who was a purchaser in good faith*, and the plaintiff's counsel asked the court so to charge and decide as a question of law. The court refused to strike out the evidence, and refused to charge or decide as requested by the plaintiff's counsel, and the plaintiff excepted. The judge then nonsuited the plaintiff, and the counsel for the plaintiff excepted.

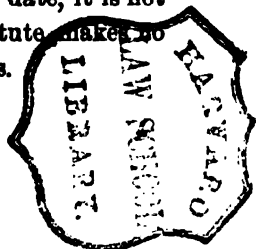
L. I. Burditt, for the plaintiff.

D. C. Bates, for the defendant.

By the Court, PRATT, J. It is very clear from the evidence of the justice who took the acknowledgment, that the conveyance under which the defendant claims title was not attested by a subscribing witness until the time of the first acknowledgment.

The principal question in the case is upon the effect of a deed thus unattested and unacknowledged. The revised statutes (1 R. S. 738, § 137) require every grant in fee, if not duly acknowledged previous to delivery, to be attested by at least one witness, and, if not so attested, it shall not take effect as against a purchaser or an incumbrancer until so acknowledged. The statute makes no exception, in terms, in favor of a purchaser in good faith. And if it did, it would not affect this case, as the plaintiff claims under a judgment, and the statute is explicit that it shall not take effect as against an incumbrancer.

What the effect would be in a case where the proof showed beyond controversy that the conveyance was actually delivered and possession taken under it at the time of its date, it is not necessary in this case to determine. The statute makes no exception, in terms, in favor of such purchasers.



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In this case there was clearly a fair question of fact for the jury to find whether the deed in question was actually executed and delivered at the time of its date, or not. It was held in *Elsey v. Metcalf*, (1 Denio, 323,) that the presumption that an instrument was executed and delivered at the time it bears date does not hold in relation to deeds in fee, unattested and unacknowledged. Without the aid of such presumption, in this case, and upon the evidence alone, the proof was, to say the least, conflicting upon this point. Haswell's testimony would tend to show the affirmative; but the testimony of Genter and Tracy, accompanied with the circumstances that the defendant attempted to procure a fraudulent acknowledgment to be certified upon it, would tend to cast doubt upon the correctness of Haswell's testimony. It was clearly not a case for a nonsuit.

New trial granted.

[ONEIDA GENERAL TERM, January 5, 1857. *Hubbard, Pratt, Bacon and W. F. Allen*, Justices.]

M. and J. BENNETT vs. BROWN.

In an action brought under the old practice, upon a bond given on an application being made to a justice of the peace, for an attachment against property, the defendant may, under the plea of *non est factum*, prove, in mitigation of damages, that the property was sold by a constable, and a portion of the proceeds applied by him to the payment of an execution issued in another suit.

Where, upon the issuing of an attachment, by a justice of the peace, a bond is given, conditioned that if the applicant fails to recover a judgment the obligors shall pay all damages and costs which the obligee may sustain by reason of the issuing of the attachment; and the applicant recovers a judgment before the justice, but the same is afterwards reversed by the court of common pleas, the obligee is entitled to recover, as part of his damages, the costs incurred in the court of common pleas.

THIS was an appeal, by the defendant, from a judgment entered in favor of the plaintiffs, upon the report of a referee. The action was brought in March, 1845, upon a bond

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executed by the defendant and one George Smead, to the plaintiffs, upon an application being made by Smead to a justice of the peace of St. Lawrence county, for an attachment against the property of the present plaintiffs, under the "act to abolish imprisonment for debt and to punish fraudulent debtors." The bond was conditioned, that if the said attachment should be issued and the said George Smead should pay to the obligees all the damages and costs which they should sustain by reason of the issuing of said attachment, if the said George Smead should fail to recover judgment thereon; and that if such judgment be recovered and the said George Smead should pay to the obligees all moneys which should be received by him for any property levied upon by said attachment over and above the amount of such judgment and the interest and costs thereon, then the said bond or writing obligatory was to be void, otherwise to be in full force and virtue. The defendant pleaded *non est factum*,

Wm. C. Brown, appellant, in person,

J. A. Hathaway, for the plaintiffs,

By the Court, PRATT, J. This action was brought, under the old practice, upon a bond given by the defendant to the plaintiffs, upon an application made by one Smead for an attachment against the property of the plaintiffs, before a justice in St. Lawrence county. Smead recovered judgment before the justice, against the plaintiffs, which was afterwards reversed by the common pleas of St. Lawrence county. On the same day of issuing the attachment another attachment was issued by the same justice, in favor of one Miller, upon which judgment was rendered against the Bennetts. The property taken was sold by a constable who held both executions, and a portion of it applied to the execution in favor of Miller. The only plea upon which the action was tried was *non est factum*. Two questions arise in this case: 1. Was it proper

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to receive evidence of the application of a portion of the proceeds of the sale of the property upon the Miller execution, under the plea of *non est factum*, in mitigation of damages? and 2d. Were the plaintiffs entitled to costs in the common pleas, as part of the damages?

The plaintiffs in this case were entitled to judgment in form for \$100, the amount of the penalty; but as that point was not taken by the counsel, either on the trial or upon the argument of the appeal, I shall only examine the above points.

The counsel for the plaintiff has gone into a very elaborate argument to show, that under the old system of pleading, the plea of *non est factum*, to an action upon a sealed instrument, only put in issue the execution of the instrument, and admitted all the other allegations of the declaration. This was scarcely necessary, as no one has denied the principle. A breach of covenant or of the condition of a bond may be admitted, and yet as a general thing the plaintiff will be put to proof of the extent of the damages. There are undoubtedly cases where no proof would be necessary, where the law would declare the damages; but, as a general rule, such proof is necessary. Now in all such cases the plea of *non est factum* does not admit the amount of damages, and it is competent for the defendant to prove that the actual damages are less than the plaintiff's claim.

But there is another principle, equally well settled under the old system of pleadings, and that is, that the plea must be a full answer to the count which it professes to answer; and if the facts are proper in mitigation and yet do not constitute a full answer, they may be given in evidence under the plea of *non est factum*. (2 Hill, 194. 23 Wend. 293. 21 id. 277.) In an action upon a bond for the performance of covenants, it was necessary for the plaintiff to assign breaches. If the defendant had a full defense to a breach he was bound to plead it, the same as he would plead to a count, or he would be deemed to admit the breach. In this case, if the whole property had been applied upon the Miller execution it would have

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constituted a good defense to the assignment of the breach that Smead had not returned the property, and by neglecting to plead it he would probably have been precluded from showing the same facts in mitigation of damages.

The fact is, there is no assignment of breaches, in this case, but simply a general assignment that the defendant did not pay the damages and costs. The property was only partially applied to the Miller execution. It could not therefore be pleaded as a bar to the action, or as a full defense to any breach that was or could be assigned. There was no method, therefore, by which the defendant could avail himself of this partial defense, except to give it in evidence in mitigation of damages. If he had attempted to plead it, his plea would have been held bad, on demurrer. The referee was therefore clearly right in allowing it to be proved in mitigation.

Upon the next question above stated, it seems to me that it is virtually decided in the ruling of the referee that the condition of the bond is not performed by the recovery of the judgment before the justice. If the reversal of the judgment in the common pleas may be deemed, within the meaning of the condition of the bond, to constitute a failure to recover judgment on the part of the obligor, it would seem to follow that any costs which the obligee might incur in any stage of the litigation up to the time of such reversal, were within not only the meaning but the words of the condition.

The condition was that the obligors should pay all damages and costs which the obligee might sustain by reason of the issuing of the attachment if the applicant failed to obtain judgment thereon. The referee has decided, and the correctness of this decision cannot be questioned under the decision of this court in *Ball v. Gardner*, (21 *Wend.* 270,) that the adjudication of the justice did not finally determine the question whether Smead failed to recover or not, but that it was finally determined only by the judgment of the court of common pleas. If this be so, I am utterly unable to perceive why the costs necessarily incurred in arriving at this final deter-

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ination do not come within the words of the bond—why the common pleas costs can be excluded more properly than the costs in the justice's court. The question does not involve the consideration of the point whether the certiorari in the common pleas is technically the same suit as the one before the justice; for the condition of the bond does not restrict the obligors to the damages and costs incurred in the same suit, but it is general, embracing in general terms all damages and costs incurred by reason of the attachment. It therefore does not come within the case of *Fenno v. Dickinson*, (4 Denio, 84.) That was a bond given by a non-resident plaintiff, and the condition was in that case to pay any sum that might be adjudged against him *in that suit*. The court held that a certiorari in the court of common pleas was not the same suit, and placed their decision upon that ground alone. In this case there is no such technical difficulty in the way of doing substantial justice between these parties.

Judgment reversed, and new trial granted.

[ONEIDA GENERAL TERM, January 5, 1857. Hubbard, Pratt, Bacon and W. F. Allen, Justices.]

 FELLOWS vs. WILSON and ENO.

Where the defense of usury is set up to an action on a promissory note, and the lender of the money, being called as a witness, refuses to testify, on the ground that his answer might criminate himself, the referee, unless he knows that no usury was in fact taken, should not attempt to compel the witness to answer.

If the counsel does not claim that usury has in fact been taken, he should so state, and ask the referee to instruct the witness that a mere agreement for a usurious premium is not criminal. If he fails to do so, it is too late to raise that question on appeal.

If, after such an explanation, the witness still declines to answer, on the ground that it might criminate himself, it will be equivalent to his swearing that a usurious premium was actually taken.

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APPEAL from a judgment for the plaintiff, rendered upon the report of Israel S. Spencer, referee. The action was upon a promissory note. Defense, usury. Defendants called the lender of the money, and he refused to testify, on the ground that it might criminate himself. Other exceptions were also taken. The referee reported in favor of the plaintiff, for the amount of the note, and interest,

S. C. Parker, for the appellants,

Hillis & Morgan, for the plaintiff.

By the Court, PRATT, J. The principal question in this case is whether the witness, Green, was bound to answer the questions put to him, and whether the referee should have directed him to answer.

When a witness claims his privilege, on the ground that the answers may criminate him, it is for the court to decide whether it is a case for such claim. (3 *Denio*, 341.) And the court must decide this, taking into consideration the evidence which may be material upon the issue.

In this case, whether the answer would tend to criminate the witness or not, would depend on the fact whether the usurious premium had actually been paid. If there was only an agreement to pay the usurious premium, the lender was not guilty of any crime, and was bound to answer. But the receipt of the usury by the lender, or an agreement to receive usury, would either of them constitute a defense to the action, and evidence to establish either would be competent.

If, therefore, the referee could have known, beforehand, the precise facts of the case, and that no usury had in fact been taken, it would have been his duty to direct the witness to answer. But this could only be known after the evidence was out. It is enough that the answer might criminate the witness, and he claiming under the responsibility of his oath that he feared that it might criminate him, the referee was right

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in not attempting to compel him to answer. If the counsel did not claim that the usury had in fact been taken, he should have so stated, and asked the referee to instruct the witness that an agreement for a usurious premium was not criminal. Not having done so, it is too late to raise that question upon the appeal. The counsel claiming this would not necessarily compel the witness to answer, for he himself might know that it was in fact taken; that the whole \$100 was handed over to the borrower, and that he afterwards paid back the premium. The benefit of the explanation would consist in its bearing upon the conscience of the witness. If, after such explanation, he still declined to answer, on the ground that it might criminate himself, it would be equivalent to his swearing that the premium was actually taken.

The question in regard to the total want of a consideration, might open up the same inquiry, and was therefore correctly overruled.

The other exceptions are clearly not well taken.

Judgment affirmed.

[ONEIDA GENERAL TERM, January 5, 1857. *Hubbard, Pratt, Bacon and W. F. Allen, Justices.*]

 CHAPMAN and CRANDALL vs. JENKINS

Where a chattel mortgage is given to secure the surety and indorser of a note made by the mortgagor, and such note, after being protested for non-payment, is paid out of the proceeds of a new note made by the mortgagor and indorsed by the mortgagees for that express purpose, the mortgage is not discharged by the payment of the original note, but continues in force, as a security to the mortgagees, for the amount of the second.

In such a case it is proper to show that the payment of the original note with the proceeds of the second was not designed to extinguish the mortgage.

APPEAL from a judgment of the Madison county court, reversing a judgment of a justice's court. The plaintiffs sued to recover the value of a horse, which one Michael B.

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Hutchins had mortgaged to them, to secure them as his indorsers on a bank note for \$150, dated November 9, 1855, which horse the defendant had caused to be taken and sold on an execution in favor of himself and partner, against said Hutchins and partner, and which was bid in by him and converted to his own use. The defendant denied generally the allegations of the complaint, and set up the judgment and execution, and a sale thereon. The principal question raised on the trial, was whether the mortgage given by Hutchins, to secure the plaintiffs, as his indorsers on said note, was a security to them, as such indorsers, after the note had been protested and taken up, by money raised on a new note signed by Hutchins and indorsed by the plaintiffs, for that express purpose.

On the trial, the execution of the original note was proved. It was in these words: "\$150. Sixty days from date, I promise to pay to the order of Clark Hebbard and N. R. Chapman, one hundred and fifty dollars, at the Crouse Bank. Manlius, November 9th, 1855.

M. B. HUTCHINS,
ROSS CRANDALL."

(Indorsed)

"Clark Hebbard,
N. R. Chapman."

The execution of the chattel mortgage, and the filing thereof, previous to the levy under the execution, were also proved. It was also proved, by the plaintiffs under objection by the defendant, that at the time the mortgage was executed, it was the understanding that the plaintiffs were to rein-dorse, to take up the first note which the mortgage was given for, and that the first note was paid by Hutchins, at the Bank of Syracuse, on or about the 10th day of January, 1856, by money received by him from the Chittenango Bank, on a note bearing date on that day, made by him and indorsed by the plaintiffs, and that this note at the Chittenango Bank was paid by Hutchins, by paying \$10 from his own individual funds, and the residue, \$140, by funds obtained on a note for that amount, made on the 16th day of February, 1856, by

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Hutchins and indorsed by the plaintiffs, payable at the Chittenango Bank, sixty days from date. The last note was not paid by Hutchins, and the plaintiffs produced it upon the trial.

The recovery of the judgment, by the defendant, against Hutchins and his partner, the issuing of the execution and sale of the horse thereon, and the forbidding the sale of the horse on the execution, and the demand thereof by the plaintiffs, were each fully proved.

The plaintiffs claimed that the mortgage extended to and was a security to them, against the payment of the last note, under the arrangement that they were to reindorse, to take up the note mentioned in the mortgage. The jury found a verdict in favor of the plaintiffs for \$70, and the justice rendered a judgment for that sum, with costs. The defendant appealed to the Madison county court, and that court reversed the judgment. The plaintiffs then appealed to this court.

N. R. Chapman, for the appellants.

D. W. Cameron, for the respondent.

By the Court, PRATT, J. No question was raised upon the trial before the justice, or upon the argument, that the mortgage was not valid as against creditors. The simple question for examination is whether it was discharged by the payment of the original note with the proceeds of the new note. If the new note had been discounted by the same bank that held the old one, it is clear, upon abundant authority, that the mortgage would not be discharged. When new securities are given for the mortgage debt, the mortgage will not be deemed discharged, unless there be an express agreement to that effect. (3 *Kernan*, 556. 1 *Comst.* 500. 20 *Wend.* 17.) And the principle of the rule has been extended to indorsers. Thus, in *Pond v. Clark and others*, (14 *Conn. R.* 334,) it was held that "when a mortgage was given conditioned to save the mortgagee harmless from his indorsement of specified notes, and

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such notes as they became due were renewed by the substitution of other notes or drafts having different names on them, but the obligations of the original indorsement by the mortgagee was preserved through all the renewals, and the substituted paper was ultimately discharged by him, the mortgage remained in force as security for the subsequent indorsements. By the change of parties the original notes were satisfied, and yet the mortgage was held not discharged. (*See also 2 Rich. S. Car. Rep. 427. 10 B. Monroe, 98. 14 Conn. Rep. 472. 10 N. H. Rep. 210. 4 John. Ch. 65. 6 Paige, 583. 23 Ala. Rep. 797. 8 Pick. 522. 1 Ströb. Eq. 257. 19 Verm. Rep. 172. 16 id. 630. 16 Pick. 22. 1 Hill. on Mort. 450, 451.*)

In the case at bar the justice was authorized to find from the testimony that the second note was, in substance, as between Hutchins and his indorsers, simply an extension of the first note, and that it was made and discounted for the express purpose of taking up the first note. Premising thus much, I think a correct conclusion is by no means difficult to be arrived at. Crandall signed and Chapman indorsed the note of November 10th, for the accommodation of Hutchins, the mortgagor. To secure the payment of the note, and to indemnify his sureties against the obligations which they had assumed for him, Hutchins executed and delivered to them the mortgage in question. The note was not paid when due, but was protested and the sureties duly charged. The mortgage thereby became absolute, and vested in the plaintiffs the entire legal title in the property. All that was left in the mortgagor was the equitable title to redeem. There was no interest left in him that could be sold, even upon execution.

How have the plaintiffs been divested of this title? A tender of the amount due would not divest it. Nothing short of actual payment of the amount due, and acceptance by them, would divest it. Has there been any such payment? Has their liability been in any manner discharged? This cannot be contended. There has at most been a substitution of one liability for another. Suppose the plaintiffs themselves had

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paid up the first note and had the cancelling iron stamped upon it; it is clear that the mortgage could not be discharged, for it was given expressly to secure them against loss in case of such contingency. Wherein does this case differ? The money with which the note was taken up was raised upon their indorsements and for that express purpose. It is clear that the condition of the mortgage has not been fulfilled, either technically or potentially. The liability of the plaintiffs has not been discharged by Hutchins according to the condition.

A point was taken that the plaintiffs had not paid the new note, but I do not see how that is material. The mortgage became absolute as soon as the indorsers become fixed, when the mortgagor failed to pay the first note at maturity, and the property became vested in them. It could only be divested, therefore, by their discharge from such liability; and having the legal title, they have the right to maintain an action for its conversion. The parol evidence, showing the relation of the parties to each other and to the mortgage and the original note, was perfectly competent. The understanding between themselves must necessarily be proved, in order to show such relation—to show which party to the note was principal and which sureties. It was proper to show that the payment of the first note with the proceeds of the second was not designed to extinguish the mortgage.

Judgment of the county court reversed, and that of the justice affirmed.

[ONEIDA GENERAL TERM, JANUARY 5, 1857. *Hubbard, Pratt, Bacon and W. F. Allen*, Justices.]

KNEETTL vs. NEWCOMB and BROWN.

A stipulation contained in a promissory note, by which the maker waives and relinquishes all right of exemption of any property that he may have, from execution on the debt, will not have the effect to make property, otherwise exempt, liable to be taken upon execution.

A PPEAL from a judgment entered upon the report of a referee. The action was brought to recover the value of certain household furniture and other articles, of the value of \$100. The property in question consisted of articles exempt by statute from execution; the plaintiff, at the time the property was taken, being a householder, having a family for which he provided. The defendants set up as a defense the recovery of a judgment against Kneettle, in favor of Newcomb, on the 7th July, 1854, for \$80.11; an execution issued thereon, which was delivered to Brown, a deputy sheriff, who sold the property by the direction of Newcomb. The judgment in question was rendered upon two notes, made by Kneettle, and payable to Newcomb, dated 10th March, 1853, the one for \$31.70, and the other for \$33.68, with interest. The notes were alike in form. The following is a copy of one of them:

"For value rec'd, I promise to pay Benj. W. Newcomb, or bearer, the sum of thirty-one dollars and seventy cents, with interest, on the first day of May, 1853, without defalcation, and I hereby waive and relinquish all right of exemption of any property that I may have, from execution on this debt. Dated the 10th day of March, 1853.

JOHN R. KNEETTL, Jr."

The referee reported in favor of the plaintiff for \$111.86.

Jenkins & Sons, for the appellants.

W. Sanders, for the plaintiff.

By the Court, PRATT, J. This was an action for taking and converting personal property exempt from execution. The

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property was taken by Brown, a deputy sheriff, upon an execution in favor of Newcomb, against the plaintiff, by direction of the defendant Newcomb. Judgment was recovered upon two notes in the usual form, with an additional stipulation as follows: "I hereby waive and relinquish all right of exemption of any property that I may have, from execution on this debt." The question is whether this agreement makes property, otherwise exempt, liable to be taken upon execution. Upon this point the decision in *Crawford v. Lockwood* (9 How. 548) is conclusive. That was a decision at general term, upon the very point in issue in this case. The court seems in that case to have given the question a very careful examination; and we should not feel at liberty to disregard the decision, even did we not concur in the conclusion at which it arrived. But, for myself, I fully concur in the correctness of that decision. I am unable to see how that stipulation can be made available as a defense to the action.

In the first place, the defendant could not justify under the execution, for the property is by law exempt from execution.

Secondly. The stipulation vested in the creditor neither right of property nor right of possession.

Thirdly. The defense is not available by way of estoppel, for the reason that both sides were aware of all the facts.

Judgment affirmed.

[OSWEGO GENERAL TERM, January 5, 1857. *Hubbard, Pratt, Bacon* and *W. F. Allen*, Justices.]

CRONK *vs.* CANFIELD and FORD.

A motion to set aside a nonsuit, upon a case, cannot be made, if the case nowhere shows whether the trial was with or without a jury. In such a case, the only method of reversing the rulings at the circuit is by appeal.

A judge, at the circuit, has no power to order a case to be heard at general term. He can only order the exceptions to be so heard.

Where no specific exception is taken to the rulings of the judge, as they occur during the trial, but at the close of the case there is a single exception to all the rulings, the exception cannot be sustained unless *all* the rulings are erroneous.

MOTION to set aside a nonsuit, upon a case. The action was upon contract. The case does not state whether the action was tried before the court or a jury. There were several objections taken to the admission of testimony, during the trial, but no exceptions were taken until the trial closed and the court nonsuited the plaintiff. The case then states, "to all which decisions and rulings of the court the plaintiff's counsel excepted." The court then ordered the case to be heard at the general term.

B. Bagley, for the plaintiff.

Brown & Spencer, for the defendant Canfield.

Geo. Morris, for the defendant Ford.

By the Court, PRATT, J. There are several difficulties in this case which are fatal to the motion, and which render it unnecessary to examine the case upon the merits.

1st. The case nowhere shows whether the trial was with or without a jury. If without a jury, this motion cannot be made. The only method of reversing the rulings at the circuit, in such case, would be by appeal.

2d. The case is ordered to be heard at general term. This the judge at the circuit had no power to do. The code only gives him power to order the exceptions to be heard at general term.

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3d. No specific exception appears to have been taken to the rulings of the judge, as they occurred during the trial, but at the close of the case there is a single exception to all the rulings.

This is simply a general exception, and cannot be sustained, at least unless *all* the rulings are erroneous. Without examining therefore, critically, to see whether a single erroneous ruling may not be found, a slight examination is sufficient to determine that they were not *all* erroneous.

Motion denied.

[ONEIDA GENERAL TERM, January 5, 1857. *Hubbard, Pratt, Bacon and W. F. Allen*, Justices.]

THOMAS, Receiver, &c. vs. WHALLON.

A receiver of a mutual insurance company, in making an assessment upon the premium notes held by the company, is the actor, and his authority depends, not upon the order of the court, but upon the existence of the facts rendering an assessment necessary and proper.

In ordering a receiver to make an assessment upon the premium notes, the courts do not adjudicate upon the liability of the company, or determine the amounts for which assessments shall be made, or the ratio of assessment. They merely sanction and authorize the acts of the receiver, who acts ministerially, not judicially.

The assessment is the act of the receiver, and in and with him is the authority to act, in the premises.

The promise of the assured is to pay upon certain conditions, and the existence of those conditions must be shown by the party seeking to enforce the contract.

The directors of a company, or the receiver if one be appointed, have no arbitrary discretion in making an assessment, but they are controlled by the explicit provisions of the statute, and must, by proper averments and proof, bring themselves within the terms of those provisions before they can enforce the collection of the premium note.

Where, in an action by a receiver, to recover the amount of an assessment made by him upon a premium note, there was no averment in the complaint and therefore no foundation laid for the introduction of evidence of the liabilities of the company, and there was no proof of the existence of any liabilities for the payment of which an assessment was necessary; *Held* that the plaintiff could not recover. *BACON, J. dissented.*

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THE plaintiff sued as receiver of the Globe Insurance Company, a mutual company incorporated under the act of 1849, upon a premium note given by the defendant on effecting an insurance with the company.

The complaint contained two counts; the first count was to recover the amount of two assessments made by the directors, before a receiver of the property and effects of the company was appointed. The second was for the amount of an assessment made by the receiver. The cause was referred, and upon the trial the plaintiff put in evidence the order of the court, in pursuance of which he was appointed the receiver of the company, and certain proceedings tending to show the assessments by the receiver. The referee gave judgment for the plaintiff, and the defendant appealed therefrom.

Geo. Barker, for the appellant.

N. C. White, for the respondent.

W. F. ALLEN, J. No evidence was given under the first count of the complaint, but the evidence was given and the recovery had under the second count, which avers the giving of the note in suit, payable in such portions and at such time or times as the directors of the said company should require; that on or about the 17th day of July, 1854, one John Brown was by an order of the court duly appointed receiver of said company; that said Brown, while possessed of the said notes and all other property of the company, as receiver, on the 13th day of June, 1855, on application duly made, procured an order of this court directing the receiver to make an assessment on the premium notes of the company, sufficient to pay off the losses therein referred to, and directing the times at which the assessments should be payable; that the said Brown went forward in accordance with the order and the charter and by-laws of the company, and made in due form and manner the assessment set out in the complaint, in which the notes are

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classified and the percentage assessed upon each class stated ; that the note in suit was assessed according to the statement, to the amount of \$78 ; that due notice of the assessment was given, and the same remains unpaid. That the plaintiff was, on the 17th day of July, 1855, duly appointed receiver in the place of the said Brown, and on the 19th day of November, 1855, on his application, this court granted an order confirming the assessment and authorizing suits.

The answer admits the giving of the note, but denies the residue of the complaint. The evidence given was entirely documentary, and consisted of the order of the court referring it to N. O. White, Esquire, to appoint a receiver of the company and take from him the proper security. 2d. The report of the referee that he had appointed Mr. Brown the receiver, and had taken from him the security designated in the order. 3d. The order discharging Brown from the receivership and referring it to W. A. Spencer, Esquire, to appoint a receiver in his place, 4th. The report of the referee that the plaintiff had been appointed receiver, and had given the requisite security. 5th. The order of the court, dated June 13, 1855, reciting the presentation of the petition of the receiver, "praying for the advice and direction of this court touching the matters therein mentioned," directing "the receiver" to make such assessment upon the premium notes belonging to said company, and mentioned in the said petition, as shall be necessary to pay the debts and liabilities of said company set forth in the 10th and 11th folios of said petition, with ten percent on said amount to cover the costs and expenses of collecting said assessment, and as shall be in accordance with the statute in such case made and provided, and as by the charter and by-laws of said company the directors of said company have or had authority to make." 6th. The petition of the plaintiff, stating his appointment as receiver, &c. and that on the 13th day of June, 1855, an order was entered in the Oneida clerk's office, directing an assessment to be made on the premium notes belonging to the said company, to pay the demands specified, amounting in the aggregate

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to \$29,244.03, and that the claims consisted wholly of losses on policies issued upon and in consideration of premium notes or of judgments recovered against the company before its failure, and which are still unpaid, or of expenses incurred or of money borrowed in carrying on the business of said company. That an assessment had been made in pursuance of the order, and notice thereof given, schedules of which are annexed to the petition; the notes being arranged in classes according to the times they were given and expired, and being assessed only for losses happening while they were in force, and that among the papers annexed would be found a full statement of all the claims against the company, and all the premium notes belonging to it, and a statement of the assessment made upon the same, and praying that the assessment be enforced and the premium note makers be directed to pay the same forthwith, or in default thereof that the plaintiff have power to sue, &c. 7th. The order of this court, of the 19th of November, 1855, in conformity to the prayer of the petition. 8th. The notice as published and mailed to the defendant. Several objections were taken to the admission of evidence during the progress of the trial, and to the right of the plaintiff to recover, at its close, which it is not necessary to consider in detail. One objection goes to the foundation of the plaintiff's right to recover upon the pleadings and evidence as they now appear, and if well taken, overrides all the other questions made before the referee. It is to the effect that no case is made by the complaint, or established by the evidence, entitling the plaintiff to make an assessment upon the premium note of the defendant, or to recover the whole or any part of it. The note is payable, by its terms, in such portion and at such time or times as the directors of the company should direct; and by the act of 1852 (*Laws of 1852, p. 67, § 2*) receivers of mutual insurance companies have full power, under the authority and sanction of the court appointing them, to make all such assessments on the premium notes of such corporations as may be necessary to pay the debts of such corporations, as

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by the charter thereof the directors have authority to make, and the same rights and remedies are given to the receivers as are possessed by the corporations or their directors. This right of assessment is not however an arbitrary or discretionary right, but it is to be exercised at the time and in the manner prescribed by law. The general act of 1849, (*Laws of 1849, ch. 308,*) under which the Globe Insurance Company became incorporated, did not make specific provision, in terms, for the assessment of notes given for premiums upon policies of insurance issued by mutual companies organized under it, but left that to be governed by the articles of association and by-laws of each company, so far as it was not settled by implication by the act itself. The tenth article of the "charter" of this insurance company provides that the notes taken by it for premiums shall be paid in whole or in part and at such times as the directors shall deem requisite for the payment of losses, and such incidental expenses as shall be necessary for transacting the business of said company. The general insurance law of 1853 (*Sess. Laws, p. 904*) remodeled the law of 1843, and by section 20 all companies incorporated under the act of 1849 were brought under all the provisions of that act, except as to their capitals. By section 13 of the act of 1853, this applied to the Globe Insurance Company. It was provided that the directors should, after receiving notice of any loss or damage by fire sustained by any member, and ascertaining the same, or after the rendition of any judgment against said company for loss or damage, settle and determine the sums to be paid by the several members thereof as their respective portions of such loss, and publish the same, &c.; and the sum to be paid by each member should always be in proportion to the original amount of his note, and should be paid within thirty days next after the publication of said notice. This section also provided that suit might be brought upon the note and the whole recovered, after a neglect to pay for the space of thirty days next after the publication of such notice, and after personal demand for payment should have been made. (*See*

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also *Laws of 1854, p. 773.*) The liability of the defendant is not an absolute liability to pay the whole amount of his premium or deposit note, but it is conditional, depending upon the contingency of the happening of losses to which he shall be liable to contribute, and which have been ascertained by the directors, (or in this case by the receiver,) and the necessity of the payment of the whole or some part of the note to satisfy the claim. This being a part of the law of the land, as well as incorporated in and making a part of the articles of association, constitutes a part of the contract, as much as if written out in the body of it. The note then being payable only upon the happening of a certain contingency, or in other words, only conditionally, it devolves upon the plaintiff seeking to enforce the collection of the note, in whole or in part, to show by proper averments and competent evidence that the contingency has occurred upon which the defendant's liability became absolute. The receiver takes the place of the directors, in ascertaining the claims upon the company, in determining upon the necessity of an assessment and the amount which each member of the company should pay upon his note, with this limitation upon his authority, that he cannot act without the sanction and authority of the court. But the court does not make the assessment, and it does not adjudicate any thing which determines the rights of third persons. It is not a proceeding *in rem*, which binds all directly or indirectly affected by it, and the statute nowhere contemplates any judicial action which operates upon the rights of any party not represented. The provision was designed to guard against indiscreet and improper assessments and expensive and unfruitful litigation on the mere motion of the receiver. But the receiver is the actor in making the assessment, and his authority depends not upon the order of the court, but upon the existence of the facts rendering an assessment necessary and proper. The necessity of the sanction and authority of the court is an additional restriction and limitation of the authority, and does not dispense with the other more important condition. In some

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cases the court or officer authorized to take action affecting the rights of property of third persons are called upon to adjudicate certain facts; and when such is the case, the adjudication is of itself incontrovertible evidence of the existence of the facts adjudicated, like every other judgment of a court or officer of a competent authority upon a question properly before it. Such is the case of the proceeding to sell estates of testators or intestates for the payment of debts. (1 *R. L.* 450, § 23. 2 *R. S.* 100. *Bloom v. Burdick*, 1 *Hill*, 130.)

But in this proceeding the courts do not adjudicate the liability of the company, or determine the amounts for which assessments shall be made, or the ratio of assessment. They merely sanction and authorize the acts of the receiver, who acts ministerially, not judicially. The assessment is the act of the receiver, and in and with him is the authority to act in the premises; and his authority depends upon the existence of the state of facts rendering the assessment necessary. The promise of the defendant is to pay upon certain conditions, and the existence of those conditions must be shown by the party seeking to enforce the contract. (*Stow v. Wadly*, 8 *John.* 124. *Ferris v. Purdy*, 10 *id.* 359.) If the directors of the company, or the receiver acting in their place in making the assessment, acted judicially, the assessment itself perhaps would be evidence, at least *prima facie*, of its necessity; but they do not act judicially, and they have no arbitrary discretion in the matter, but they are controlled by the explicit provisions of the statute, and must by proper averments and proof bring themselves within the terms of those provisions before they can enforce the collection of the premium notes. (*Bangs v. Gray*, 2 *Kern.* 477. *The Herkimer Co. Mutual Ins. Co. v. Fuller*, 14 *Barb.* 373. *In the matter of Bangs*, 15 *id.* 264. *Shaughnessy v. The Rensselaer Ins. Co.*, 21 *id.* 605.) In *Brouwer v. Appleby* (1 *Sand. S. C. Rep.*, 158) it was a part of the case agreed upon, that the unpaid losses of the company at the time of the trial exceeded \$360,000, and its assets of all kinds, including the defendant's note, did not

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exceed \$200,000. The case of *The Same Plaintiff v. Hill* (*Id.* 629) was tried after the disposal of the case first cited, and only such questions were made as were supposed to distinguish the two cases. It is evident that both court and counsel supposed it necessary for the plaintiff to show the liability of the company to an amount rendering it necessary to call upon the members of the company for contribution. The premium note is but one form of an agreement by which the signer undertakes to contribute in a given proportion, and on certain conditions, to the losses and expenses of the company. In this case there is no averment in the complaint, and therefore no foundation laid for the introduction of evidence of the liabilities of the company, and there was no proof or attempt to prove the existence of any liabilities for the payment of which an assessment was necessary. If the statement of the fact by the receiver, in his petition for leave to make the assessment, could be evidence of the fact against a third person, it was not put in evidence. It is recited, or rather referred to, in a manner not satisfactory, in the order made in June, and the debts for which an assessment was directed were not stated, in any way, but were referred to as stated in certain folios of the petition, and the statements of the petition are more directly referred to and recited in a subsequent petition presented by the present plaintiff; but all this did not supersede the necessity of producing the original petition, if that was any evidence of the facts stated in it. (*Wilson v. Conine*, 2 *John*. 280.) A record, decree or order cannot be proved by a recital in any other record, decree or order, as against third persons. (1 *Greenl. Ev.* § 511. *Com. Dig. Evidence*, B. 5.) The judgment must be reversed, and a new trial granted, with costs to abide the event.

HUBBARD and PRATT, Justices, concurred.

BACON, J. dissented.

New trial granted.

[ONEIDA GENERAL TERM, JANUARY 5, 1857. *Hubbard, Pratt, Bacon* and *W. F. Allen*, Justices.]

MCKINERON *vs.* BLISS.

Although the general laws affecting the subject, enacted by the British parliament, do not extend to the colonies of Great Britain, unless they are specially named, it seems this is not the rule in regard to those general statutes which relate to the king's prerogative, and his disposal of the crown lands or revenues.

Those laws are to operate upon the sovereign and his acts, and are not to affect the subject; and hence the reason of the rule which exempts colonies from the effect of the ordinary legislation of parliament—to wit, that they are not represented—does not apply, and the rule itself should not exist.

The king's grants are matters of public record, and no freehold can be granted by him but by matter of record. And the grants must pass through the prescribed offices, and be transcribed and enrolled.

The record of a grant, like every other record of a foreign court or government, is susceptible of proof.

A patent can always be proved by a *constat*, or an exemplification of the record, as well as by producing the patent itself.

If the patent cannot be produced, the proper evidence of it is an exemplification from the appropriate offices in England, or proof that upon application to those offices no record was to be found.

A party claiming under a patent from the king cannot, after proof of fruitless searches made in the state offices of this state, and in several county clerks' offices, for the patent, be allowed to ask a witness what is reported among the settlers on the tract to have been the disposition made of the letters patent.

ACTION of ejectment for about 60 acres of land in Herkimer county, part of lots 9 and 11 in Susannah Johnson's 3000 acre tract in the 4th allotment of the royal grant, in the town of Salisbury, Herkimer county. The tract known as the "royal grant" embraces a portion of the town of Herkimer, and the principal portion of Fairfield and Newport, parts of Russia and Manheim, and all the settled part of Salisbury. The plaintiffs gave in evidence the will of Sir William Johnson, (the grantee,) by which 3000 acres of the royal grant were demised to Susannah, and they deduced title to the premises in question under Susannah Johnson. They also referred to certain acts of the legislature of the state, relating to the escheat and forfeiture of certain parts of the royal grant as the property of Sir John Johnson, and reciting that they did of

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right belong to others, including Susannah Johnson ; but the enacting part of the statute did not relate to the title of Susannah Johnson. After proof of a search in the state offices of this state and in the clerks' offices of several counties, and that the patent to Sir William Johnson, of the tract known as the royal grant, could not be found, the plaintiff propounded this question to a witness : " What is reported among the settlers of this tract, to have been the disposition made of the instruments of title or letters patent ? " Which was objected to and excluded by the court, and the plaintiff was nonsuited, on the ground that the patent was not sufficiently proved. The cause was tried at the Herkimer circuit, in May, 1856, before PRATT, justice. The plaintiff appealed.

Field & Snyter, for the appellant.

A. Loomis, for the respondent.

By the Court, W. F. ALLEN, J. Hearsay or reputation is never evidence, except in particular cases, and when from the nature of things no better or higher evidence can be obtained. (*Gould v. Smith*, 35 *Maine Rep.* 513.) But in this case the plaintiffs had not exhausted the sources of other and better evidence. Had possession accompanied the devise of Sir William Johnson, it would have been different, and the court might have been authorized to presume a grant from the crown. The plaintiffs count and found their claim of title upon the prerogative of the king as the universal occupant of all derelict lands, and the original owner of all the lands within his domains. The title of the king was in right of his crown, and could only be granted by him in pursuance of law. Patents of land, granted by him without law or contrary to law, are void. The general laws affecting the subject, enacted by parliament, I am aware, do not extend to the colonies of Great Britain, unless they are specially named ; but I do not understand that this is the rule in regard to those general

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statutes which relate to the king's prerogative and his disposal of the crown lands or revenues. Those laws are to operate upon the sovereign and his acts, and are not to affect the subject; and hence the reason of the rule which exempts colonies from the effect of the ordinary legislation of parliament—to wit, that they are not represented—does not apply, and the rule itself should not exist. The king's grants are matters of public record, and no freehold can be granted by him but by matter of record; and they must pass through the prescribed offices and be transcribed and enrolled. (2 *Bl. Com.* 346. *Com. Dig., Patent, A. E.* 2 *Thomas' Coke*, 489, *n. a.*) This record, like every other record of a foreign court or a foreign government, was susceptible of proof. A patent can always be proved by a *constat* or an exemplification of the record, as well as by producing the patent itself. (1 *Phil. Ev., Cowen & Hill's ed.* 463, (3). *Thomas' Coke*, 297. *Page's case*, 5 *Rep.* 105.) A grant, or charter from the crown, which ought to be by matter of record, may, under circumstances, be presumed, though within the time of legal memory. And a grant was presumed where there had been a possession in accordance with the alleged grant for 350 years. (*Mayor of Kingston v. Harris, Cowper*, 102.) I am unable to see why the proper evidence was not an exemplification from the proper offices in England, or at least some evidence that upon application to those offices no record was to be found. The places in which search was made would not be likely to repay the labor by bringing to light the desired instrument. It is not unlikely that if any patent was ever granted for the tract in question, it was taken to Canada on the flight of the individual who succeeded to the possession of the instruments of title of Sir William Johnson, and remained there. The evidence afforded by the statutes relied upon by the plaintiff was very slight as to the existence of any grant from the crown to Sir William Johnson, even if they, or the recitals, would be evidence against a stranger, which may be doubtful. They furnished no means of ascertaining the extent or boundaries of the tract, or the

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estate granted, or the conditions of the grant, or whether it was without condition and absolute. It would be quite too slight evidence to authorize a judgment of ouster against a party in possession. But it is enough to say that the secondary evidence was not competent, for the reason that the higher evidence, if any existed, was within the reach of the party.

The judgment must be affirmed.

[ONEIDA GENERAL TERM, January 5, 1857. *Hubbard, Pratt, Bacon and W. F. Allen, Justices.*]

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To entitle the holder of negotiable paper, which has been procured by fraud, to retain and enforce the same against the party defrauded, he must show that he paid value for it at the time, or incurred some responsibility, or relinquished some right, or discharged a precedent debt, upon the faith and credit of the paper.

O., the drawer of two bills of exchange, obtained from the plaintiff his accommodation indorsement thereof, by means of a gross fraud, and negotiated the bills, thus indorsed, to the defendants, to meet an indebtedness from the drawer and drawees to them, a part of which was upon bills of exchange then overdue and under protest. There was no express agreement that the new bills should be taken in absolute payment of the protested paper, or as collateral security for it. Nor were the protested drafts delivered up to the parties, at the time; but subsequently, the parties to the old drafts were credited with the avails of the new, and charged with the old, and the latter were marked or cut with the cancelling iron of the bank, and placed in a drawer with paper of the like character, where it remained. *Held* that the defendants were not entitled to protection as bona fide holders for value, against the equities of the plaintiff; but that the latter could maintain an action against them, to restrain them from transferring the bills, or enforcing their collection, and to compel them to cancel the plaintiff's indorsements. *Held also*, that evidence of what passed between O. and the plaintiffs, and of the declarations made by O. at the time the indorsements of the plaintiffs were procured, was properly admitted.

Under such circumstances, if the transfer of the paper is not in payment and discharge of the prior indebtedness, as between the parties—and without affirmative evidence of the fact, it will not be presumed—it is not a transfer in payment, so as to cut off the equities of third persons.

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THE plaintiff brought this action to restrain the defendants from transferring or enforcing the collection, as against the plaintiff, of two bills of exchange, one for \$2000, and the other for \$2500, dated January 17, 1856; the former payable sixty, the latter seventy-five days after date, drawn by S. Osborn, jun., Herkimer, on Osborn, Trumbull & McDonald of New York, payable to the order of, and indorsed by, the plaintiff; and to compel the defendants to cancel the indorsement of the plaintiff. The allegation was that the plaintiff was an accommodation indorser for the drawer, at the request of the drawer, who was one of the firm upon whom the bill was drawn, and that the indorsement was obtained by the false and fraudulent representations of the drawer, and that the defendants are not *bona fide* holders for value. The cause was tried at the Herkimer circuit before Justice PRATT, who gave judgment for the plaintiff, according to the demand of the complaint, and the defendants appealed from that judgment.

R. Conkling, for the appellants.

F. Kernan, for the respondent.

By the Court, W. F. ALLEN, J. The bills in question, with the indorsements of the plaintiff, came into the possession of the defendants on the day of their date, (January 17, 1856,) and this suit was commenced and the preliminary injunction served two days thereafter, (January 19;) and as the circumstances under which the indorsements were obtained, if as alleged by the plaintiff, would not constitute a defense to an action at the suit of a bona fide holder for value, this action was necessary to the protection of the plaintiff, and was properly brought, and may be sustained if the evidence sustains the allegation of fraud, and the defendants are not holders for value, without notice of the fraud by which the plaintiff was induced to make the indorsements. Although, if the defend-

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ants should continue the holders of the bills until after they matured, the plaintiff might, if his allegations are true, defend himself at law in any action to be brought against him, the defense would be of no avail as against any other person or corporation to whom the defendants might transfer them before due; and hence this action was necessary and proper. (*Reed v. Bank of Newburgh*, 1 Paige, 215. *Coddington v. Bay*, 20 John. 637. *Hamilton v. Cummings*, 1 John. Ch. 517.) That the indorsements were procured by a very gross fraud is very clearly established by the evidence, and is not disputed by the counsel for the appellants. With this part of the finding of the justice, upon the trial, no fault is found upon the argument of the appeal, either in the printed points or otherwise; but, on the contrary, it was conceded that the plaintiff was induced to indorse the bills by the false and fraudulent representations of the drawer, substantially as stated in the complaint; so that we are released from the examination of this branch of the case. The serious question, and indeed the only question, upon the merits, is that arising out of the evidence of the circumstances and consideration of the transfer of the paper to the defendants; and upon this point there was some circumstantial but no substantial difference in the testimony of the two principal witnesses of the respective parties. The substance of the transaction is the same as detailed by both witnesses. The drawees of the bills indorsed by the plaintiff were at their date indebted to the defendants to a large amount, upon negotiable paper not yet due, and to the amount of \$4500 upon paper overdue and under protest, and were in bad credit and actually insolvent. The drafts, with the indorsements of the plaintiff, were procured in order to provide for the debt past due, which was represented by two bills of Osborn on the firm of Osborn, Trumbull & McDonald, for \$2000 and \$2500 respectively; and that indebtedness constituted the only consideration of their transfer to the defendants. The protested drafts were not delivered to the parties at the time of the transfer of the new bills, but on the

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evening of the 19th of January, a short time before the service of the papers for the commencement of this action, the parties to the old drafts were credited with the avails of the new and charged with the old, together with the expenses of the protest, &c., and the latter were marked or cut with the canceling iron of the bank, and placed in a drawer with paper of the like character, where it remained up to the time of the trial. This was the transaction, and it must speak for itself. It was carried out in substance according to the understanding of the parties. There was no express agreement that the new bills should be, or should not be, taken in absolute payment of the protested paper, or as collateral security for it. It was doubtless the understanding of both parties that the debtors should have the benefit of the new paper in liquidation of the old, and that the difference in amount between the two, growing out of the accumulation of interest, protest, &c. should be settled and paid by the parties liable. The form which the transaction took, upon the books of the defendants, and the disposal of the protested paper, was the result of an orderly and proper method of book-keeping and the course of business which was deemed proper by the officers of the bank, under the circumstances, rather than of any express agreement between the parties.

Whether a title acquired under these circumstances, and upon this consideration, is a valid title, or one acquired bona fide and *for value*, and perfect as against the equities of the plaintiff, is the principal question made upon the appeal. For although the counsel for the respondents makes a point upon the complicity of the cashier of the defendants, in the fraud perpetrated upon the plaintiff; there is no proper allegation of such fraudulent combination, in the complaint, and the judge, at the circuit, did not base his decision upon any such fact. It is not, therefore, deemed necessary to examine the evidence which it is claimed bears upon the question. In other words, as the case comes before us, that question is not in it. That a holder for value can alone retain, against the defrauded

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party, or enforce the collection of, negotiable paper procured by fraud, is not questioned. (*Rogers v. Morton*, 12 Wend. 484. 14 *id.* 575.) It is conceded that something more is necessary, to support the title of the holder, as against the true owner who has been fraudulently deprived of negotiable paper, or against the parties to such paper, obtained by fraud or without consideration, than that which would be sufficient as a consideration to support a transfer as between the parties negotiating it. In this case the bills were transferred to the defendants in the ordinary course of business, and upon a good consideration, as between them and Osborn, who, in the absence of any fraud, was fully authorized to deliver them to the defendants, so as to bind the plaintiff as indorser. But the question is, whether they were transferred for value given at the time, so as to protect the defendants against the equities of the plaintiff. The general principle settled in the case of *Bay v. Coddington*, (5 John. Ch. 54, and 20 John. 637,) that the consideration which will protect the indorsee of negotiable paper against the latent equities of parties or third persons, must be something of value parted with or paid at the time, in money, in property, some responsibility incurred or some right relinquished upon the faith and credit of the paper, is fully recognized in all the cases to be found in our books; and the only difficulty has arisen in the application of this principle to the circumstances of each case. A precedent debt, when the note or bill is taken in payment and satisfaction of it, and securities are given up or lost in consideration of the transfer, has been held a sufficient consideration as a present parting with value on the faith of the note. One difficulty in this case is in the want of evidence that the bills in question were taken in payment of the precedent debt of Osborn, so as to bring this case within the principle contended for. The judge has found that they were not so taken, and his conclusions appear to be warranted by the evidence and the course of decisions in this state. As between the defendants and their original debtors, it could not have been claimed

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by the latter, under the authorities, that their liability was discharged by the transfer of those drafts, unless payment resulted from them. There was no express agreement that they should be received in absolute payment. Upon the refusal of the drawees to accept, or upon the dishonor of the bills at maturity, the defendants could have resorted to the original liability of their debtors and maintained an action against them upon the protested drafts. (*Olcott v. Rathbone*, 5 Wend. 490. *Cole v. Sackett*, 1 Hill, 516.) The new bills were but the bills of the debtors themselves, and not the paper of a third person. The plaintiff was the accommodation indorser of the debtor, and was known by the defendants' cashier to be such, which would bring the case within the principle of *Cole v. Sackett*; *Waterliet Bank v. White*, (1 Denio, 608;) *Waydell v. Luer*, (5 Hill, 448; 3 Denio, 410;) *Highland Bank v. Dubois*, (5 Denio, 558;) *Elwood v. Deifendorf*, (5 Barb. 398.) If the transfer was not in payment and discharge of the prior indebtedness, as between the parties—and without affirmative evidence of the fact, it will not be presumed—then it was not a transfer in payment, so as to cut off the equities of third persons. I have met with no case in our own courts in which a transfer of commercial paper is held to have been made in payment of an existing debt, so as to affect the parties to the paper transferred, or third persons claiming title to it, in which it is not in fact payment as between the parties to it. It is possible that the convenience and security of those dealing in commercial paper require that the law as held in this state should be somewhat modified, and perhaps be made to conform to the opinion of Justice Story in *Swift v. Tysen*, (16 Peters, 1;) but if this be so, it can only properly be done by the court of last resort, which can alone authoritatively review and modify the decisions of the court for the correction of errors. The decisions in our own state are not, I think, inconsistent with each other; and with the exception of the case of *White v. Springfield Bank*, (3 Sandf. S. C. R. 222,) there has been no attempt to detract from the force of the case of

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Coddington v. Bay, (20 John. 636,) or the leading opinion of the chancellor, in *Stalker v. McDonald*, (6 Hill, 93.) In *Coddington v. Bay*, the notes were transferred to the defendants to indemnify them against responsibilities already incurred for the party transferring them. Ch. J. Spencer says: "Now I understand by the usual course of trade, not that the holder shall receive the bills or notes thus obtained as securities for antecedent debts, but that he shall take them in his business and as payment for a debt contracted at the time." If the judge was right in his conclusion, as I think he was, that the drafts in question were not transferred in payment, absolutely, of the prior indebtedness of Osborn, Trumbull & McDonald, they were of course received as security, and the case is directly within *Coddington v. Bay*. The next case was that of *Wardell v. Howell*, (9 Wend. 170,) and there the note was transferred as collateral security for a prior debt, and in consideration of its receipt the plaintiff discontinued a suit which he had commenced against his debtor, and gave him time. This was not held a sufficient giving up or parting with any valuable right or thing, to give the party the rights of a bona fide holder for value. In *Rosa v. Brotherson* (10 Wend. 85) the question was directly presented, and it was expressly decided, that when a creditor receives the transfer of a negotiable note in payment of a precedent debt, he takes it subject to all equities existing between the original parties. In that case it did not appear that any security was given up. Chancellor Walworth says, in *Stalker v. McDonald*, that there is no doubt that *Rosa v. Brotherson* follows the decision of *Coddington v. Bay*. In *Payne v. Cutler*, (13 Wend. 605,) the notes were transferred and the value of them allowed on a settlement of accounts with the payee, and it was held that the holders were not holders for value, and that the consideration was inquirable into in an action by them against the maker. Ch. J. Savage says: "The plaintiff in this case neither having advanced any thing, nor incurred liability, on the credit of those notes, we must on this motion assume that the notes were

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obtained by fraud, and the defense was therefore proper." *Francia v. Joseph* (3 *Edw. Ch.* 182) was, like this, an equitable action to recover possession of a promissory note, which, as was alleged, had been fraudulently diverted from its proper use, and the defendants had received it as security for a precedent debt of one who held it as the agent of the plaintiffs, and had on receiving it given up another note, made by a third person, which had been deposited with them as security for the same debt, and their title was declared invalid as against the claims of the rightful owner of the note. *The Bank of Salina v. Babcock* (21 *Wend.* 499) was decided upon grounds which were supposed to make the case an exception to the general rule, and was not considered by the court pronouncing the decision as overruling any of the antecedent cases in our own courts. The court held that the plaintiff did pay value for the note, in the strict sense of the term. Chief Justice Nelson says: "The proceeds of the note were placed to the credit of Trowbridge & Co. for whom it was discounted, and were drawn out, not, I admit, by checking for the money, but by the *cancellation* of the securities held by the plaintiff, which was the same thing in legal effect." By this cancellation a responsible indorser had been discharged, or if not discharged, the remedy against him had been rendered doubtful; and upon this distinguishing feature of the case the decision is rested. *The Bank of St. Albans v. Gilliland* (23 *Wend.* 311) was put upon the ground that the note was taken by the plaintiff *in full satisfaction of the prior indebtedness, without recourse, and the debt discharged*. The court, in giving judgment, reaffirm the doctrine that receiving a note for a precedent debt is not receiving it for value within mercantile usage, and refer approvingly to cases sustaining the doctrine. The plaintiff had discharged the personal responsibility of the original debtors, on the credit of the note, and had thus parted with value. The decision in the case of the *Bank of Sandusky v. Scoville* (24 *Wend.* 115) is placed by the court upon the same principle. Bronson, J. says: "The note was dis-

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counted by the plaintiffs for the benefit of Ward, to *extinguish* his debt, and the avails went to discharge his liability to the bank." Emphasis is laid upon the fact that a debt was "*extinguished*," and a personal liability of the original debtor "*discharged*." *The Mohawk Bank v. Corey* (1 Hill, 513) was an action against the defendants as the indorsers of the note of one Borst, which had been transferred to the plaintiff in *payment* of two notes, of the same maker, indorsed by one Voorhies, which were delivered up and a suit which had been commenced on them discontinued. The court held, 1st, that there had been no diversion of the note from the purpose for which it was made and indorsed; and 2dly, that if there had been, the plaintiffs would still be entitled to recover as bona fide holders for value, within the principle of the *Bank of Salina v. Babcock*. *Securities* had been given up. *Stalker v. McDonald* (6 Hill, 93) affirmed a judgment of the supreme court, to the effect that the holder of negotiable paper would not be protected as against the equities of third persons, when it appeared that the paper was received as a security for an antecedent debt, and the holder neither parted with value on the credit of it nor relinquished any previous security. This is probably the extent to which the case goes, as authority; but the chancellor, whose opinion is entitled to great weight, expresses the opinion that it would be the same if the paper were received nominally as payment. He does this upon a full review of all the cases, English and American, and giving to the cases in the 21st and 24th of Wendell their full effect as deciding correctly the questions presented by them, under the circumstances disclosed. *Small v. Smith* (1 Denio, 583) was somewhat similar in its circumstances to this case, omitting what was done by the defendants at their banking house after the transaction between them and Osborn had been consummated, and in the absence of the latter. The plaintiff had a debt against the maker of the note in suit, and pressed him for security, and agreed to take his note at one year indorsed by the defendant, and the note was procured and de-

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livered accordingly. Judge Beardsley, in delivering the opinion of the court, held that it was error in the circuit judge to submit to the jury whether the note was received in satisfaction of the prior indebtedness, as there was no evidence tending to show that fact. The case was decided upon another point. *The Seneca County Bank v. Neass* (5 Denio, 329) simply recognizes the principle that the *satisfaction* of a precedent debt may form a valuable consideration for the transfer of negotiable paper. But the case was decided upon another ground, and the questions now presented were not considered by the court. *White v. The Springfield Bank* (1 Barb. S. C. Rep. 225) was not a well considered case, and, under the circumstances, if they appeared upon that motion as they were developed upon the hearing of the case on the merits, the decision might well have been different, and yet been consistent with all the cases that had gone before it. *Stewart v. Small* (2 Barb. S. C. Rep. 559) decided that a person could not be said to have parted with value for a note, when he had only given credit for the amount of it upon the note of an insolvent party—paper which he knew to be of no value. And that is all that has been done by the defendant in this action upon the credit of the drafts which they claim to retain and enforce against the plaintiffs. The case cited was decided by Judges Cady, Willard and Edwards, and the argument of Judge Cady is entirely applicable to the facts of this case. In *Montross v. Clark* (2 Sandf. S. C. Rep. 115) the note in suit was transferred to the plaintiffs in *part payment* of a note they held against the payee; and Judge Sandford instructed the jury that if the note had been diverted from the purpose for which it was made by the defendant and lent to the payee, the plaintiffs could not recover; thus directly affirming the doctrine of *Rosa v. Brotherson*, and the other cases cited. Of course what Vanderpoel, J. said upon this point—the plaintiff having recovered—is entirely *obiter*, and the remark was not as well considered as it would have been if it had been material to the case. *Spear v. Myers* (6 Barb. 445) was decided by

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Judges Jones, Edmonds and Edwards, and distinctly reaffirms the doctrine of *Rosa v. Brotherson*, that parties who receive a note which has been improperly put in circulation, in payment of an existing debt, without parting with any value for it at the time, or surrendering any securities, are not entitled to hold it, as against the rightful owner. The plaintiffs had received the note from Knapp, their debtor, in payment of their debt, gave him a receipt for it, and balanced the accounts on the books. This is certainly as much as was done by the defendants here; for their cancelling iron was of no more force as applied to the papers, than was the receipt given to the party. Both acts were open to explanation. (*Watervliet Bank v. White*, 1 Denio, 608.) *White v. The Springfield Bank*, which was before Judge Edmonds, in 1st Barbour, was before the superior court of the city of New York on its merits, and is reported, 3 Sandf. S. C. Rep. 222. The case was one of an absolute discharge of a precedent debt, and also one in which the defendants, having collateral securities to a given amount and which covered the draft given up, on the receipt of the note of the plaintiff, made other advances in lieu of the advances made upon the draft, and which further advances fully exhausted the collaterals, so that the defendants made a case of very strong equity. By acting upon the faith and credit of the plaintiff's note they had parted with value, and unless permitted to retain the note they would be the losers, to its full amount. But in this case the defendants are in as good a situation, if they are compelled to surrender the bills indorsed by the plaintiff, as they would have been if they had never taken them. They parted with nothing, and if they can collect the drafts they are by so much the gainers by the experiment. *Youngs v. Lee*, (18 Barb. 187,) affirmed 2 Kern. 551, was well decided in accordance with the previous decisions of the courts of this state. In consideration of the note in suit, the plaintiffs had withdrawn from the bank another note of the party from whom they received this note before its maturity, and surrendered it to the maker. In other words,

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they had taken it in satisfaction of a debt not yet due and surrendered the evidences of that debt, and the decision in the court of appeals was put upon this ground alone. Judge Johnson says : "In the case before us, the note was received in extinguishment of a demand upon a note not yet due, and the note was delivered up. The surrender, upon the consideration of a security not due, extinguishes the security. The plaintiffs, therefore, became holders for value, and are entitled to recover."

There was nothing in this case like the surrender of any security by the defendants upon receiving the drafts indorsed by the plaintiff. The transaction, as between them and Osborn, was complete when the latter delivered to them the drafts. No other act was necessary, or was contemplated, to vest the title to the drafts in them, and they were then the holders of both sets of securities. The one was therefore collateral to the other, as found by the judge. The subsequent acts of the defendants were performed by their own volition and not at the request of, or for the benefit of, any third party, or in performance of any part of the agreement under which they acquired title to the paper. Their own acts cannot be resorted to, to fortify their own title. They were, however, of no legal importance, even if done with the knowledge and assent of Osborn. The equities of the plaintiff are very manifest, and the defendants have failed to show a legal title to the drafts, which can overcome them.

The objection to evidence of what passed between Osborn and the plaintiff, at the time the indorsements were procured, is clearly untenable. The gist of the action, and the foundation of the plaintiff's equities, are the false representations of Osborn, and to shut out the evidence of the declarations of Osborn, made in the commission of the fraud, would be simply to debar the injured party of all relief. The complaint does not necessarily mean that the representations were made in the presence of the defendants' cashier; and if it did, that part of the averment would be immaterial, so far as the case

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upon which relief was finally granted is concerned, and might well have been disregarded, or considered as struck out as surplusage.

The proof offered, of the purpose for which the drafts remained in the possession of the defendants after the 19th of January, 1856, was inadmissible, as only tending to show the understanding of the defendants of the agreement and the resulting legal rights of the parties, and this too after *lis mota*, the practical construction of the agreement by the defendants after suit brought.

The offer of the defendant to contradict Osborn as to an immaterial fact, to wit, the circumstances attending another transaction—a prior loan from the defendants of \$4000—with which the plaintiff was not connected, was properly excluded. As to that matter the defendants had made Osborn their own witness, and were not allowed to contradict him by way of impeachment. So, too, the evidence offered that the witness for the defendant refused to swear, in the affidavit which was introduced with a view to discredit him, to something much more favorable to the defendants and much more discordant with his evidence on the trial than was actually sworn to by him in the affidavit, was not competent, as it did not explain the facts stated in the affidavit, or tend to qualify them or explain or account for the discrepancy, if any existed, between the statements in the affidavit and the evidence given on the trial.

These are all the questions, and all the exceptions which were made by the counsel for the defendants in his printed points, or presented by him upon the argument; and I am unable to discover any error calling for a reversal of the judgment.

The judgment must be affirmed, with costs.

[ONEIDA GENERAL TERM, January 5, 1857. Hubbard, Pratt, Bacon and W. F. Allen, Justices.]

JOHNSON and others *vs.* THE NEW YORK CENTRAL RAIL
ROAD COMPANY,

Forwarders and warehousemen are, like other agents, bound by the directions of their principals. The directions constitute a part of their authority, and operate as a limit upon it.

Any unnecessary deviation or departure from the instructions is at the peril of the agent, and renders him liable for any loss resulting from it.

But a deviation from the course marked out by the principal, which is rendered necessary by the circumstances of the case, which were not foreseen by the principal, is justifiable, if the agent exercises the care and skill which the character of his agency calls for; unless the instructions amount, in substance, to a prohibition of the act in any other than the prescribed method.

The plaintiffs shipped, at Little Falls, on the defendants' cars, certain goods consigned to a person in New York, with directions to the defendants to forward from Albany by the "People's Line" of steamboats. On the arrival of the cars at Albany the People's Line refused to take the freight. The navigation of the Hudson river being about closing, the defendants shipped the goods by the Eckford line of tow boats, a responsible line and in good reputation, which was the usual mode of conveying freight, of that kind. The property being lost on its passage from Albany to New York, by the perils of navigation; it was held that the defendants, in consequence of the refusal of the People's Line to carry the freight, were in possession of it as forwarders without any directions as to the route or means of conveyance, and were therefore bound to exercise their discretion, and select the best that presented; that the established usage and course of business became the rule of duty governing them; and that having forwarded the goods by the customary method, they were not liable for the loss.

ACTION to recover the value of a quantity of tow, lost on its passage from Albany to New York by some of the perils of navigation. The cause was tried before Judge PRATT, at the Herkimer circuit, without a jury. On the trial it appeared that the bales and sacks of tow were put in the defendants' cars at Little Falls, consigned to E. Ludlow, jr., New York, with directions to the defendants to forward from Albany by the People's Line of steamboats. On the arrival of the train of cars at Albany, that line of steamboats refused to take the freight, upon the ground that they could not take it without violating an act of congress. The navigation of the Hudson river was about closing, and the defendants shipped the property by the Eckford line of tow boats, a responsible

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line and in good reputation, which was the usual mode of conveyance of freight of this kind. The judge at the circuit gave judgment for the plaintiffs, for the value of the freight, with interest, and the defendants appealed from that judgment.

C. B. Cochrane, for the appellants.

G. A. Hardin, for the respondents.

By the Court, W. F. ALLEN, J. There is no dispute as to the relations which the parties occupied towards each other, in respect to the lost property. They agree that the property was delivered to the defendants at Little Falls, to be by them carried and conveyed to Albany and to be by them forwarded thence to New York, with directions to forward it by a particular line of steamboats. It is conceded that the liability of the defendants as carriers ceased with the arrival of the goods at Albany, and that from that time they occupied a different relation, and were charged with different duties and responsibilities. The defendants then became mere warehousemen and forwarders, and liable only for a breach of any duty growing out of those relations. They were in the situation of one receiving goods to forward, having no concern in the means of transportation, or interest in the freight, and were therefore mere warehousemen and agents of the plaintiffs. (*Story on Bailments*, § 502.) It can make no difference in their liability whether they became possessed of the property at Albany by receiving it from their own cars, or by receiving it by some other channel. It is their possession for a specific purpose, which determines their character and furnishes the rule of their liability. They were responsible only for ordinary care and skill and diligence. (*Story on Bailments*, §§ 442, 455. 1 *Parsons on Contracts*, 617. *Roberts v. Turner*, 12 *John*. 232. *Platt v. Hibbard*, 7 *Cowen*, 497.) In the absence of any specific directions as to the mode or route of conveyance, the duty of the defendants would have been well discharged

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by forwarding the goods in the accustomed and usual manner, according to the course of trade, by a responsible and reputable individual or association. (*Brown v. Denison*, 2 Wend. 593. *Ackley v. Kellogg*, 8 Cowen, 223. *Van Santvoord v. St. John*, 6 Hill, 157.) Forwarders and warehousemen are, however, like other agents, bound by the directions of their principals. The directions constitute a part of their authority, and operate as a limit upon it. (*Story on Agency*, § 192. *Dunlap's Paley*, 3, n. A.) Any unnecessary deviation or departure from the instructions is at the peril of the agent, and renders him liable for any loss resulting from it. He becomes the insurer of the goods of his principal if, without authority or contrary to instructions, he causes them to be shipped or forwarded to their place of destination by a route or means of conveyance of his own choosing. (*Ackley v. Kellogg*, *supra*.) But a deviation from the course marked out by the principal which is rendered necessary by the circumstances of the case, which were not foreseen by the principal, is justifiable, if the agent exercises the care and skill which the character of his agency calls for. He may, if it becomes impossible to execute his agency in the precise manner directed, adopt the ordinary and usual method for accomplishing the same purpose; and if he does so with ordinary care, skill and diligence, he will not be responsible for the consequences, but his acts will be the acts of his principal; unless, indeed, the instructions amount in substance to a prohibition of the act in any other than the prescribed method. (*Forrester v. Boardman*, 1 *Story's Rep.* 51. *Judson v. Sturgis*, 5 Day, 556. *Story on Agency*, §§ 193, 194.) This would be so, especially in cases where the departure from instructions was circumstantial merely, and not substantial. All that the law requires is a substantial compliance with the orders of the principal, (*Parkhill v. Imlay*, 15 Wend. 431;) and a deviation from the appropriate course will not vitiate his act if it be immaterial, or circumstantial only, and does not in substance exceed his right and duty. (*Story on Agency*, § 85.)

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1st. There is no evidence, and no circumstance from which it can be inferred, that the intention of the plaintiff was that the goods should be sent from Albany to New York only by the "People's Line," and that if they could not be forwarded by that line they were to be detained at Albany, and not sent forward. It was not so expressed in the direction, and no provision was made by the plaintiff for the goods at Albany, in that contingency. In the margin or at the foot of the freight way-bill from Little Falls to Albany, not making a part of the way-bill, or the direction of the goods, are the words "via People's Line," designed only as a memorandum by way of direction to the rail road servants at Albany; and this is the only evidence in the case of any direction being given by the consignors.

2d. The substantial thing to be accomplished was the sending of the goods forward to New York. The particular boat or vessel by which they should be forwarded was merely circumstantial; and if the directions in that respect could not be obeyed, the substantial thing to be done could be accomplished, and it devolved upon the agent, in the exercise of ordinary diligence, to see that it was done. And had the defendants omitted to forward the goods in the usual manner and according to the course of trade, and detained them in their warehouse at Albany and harm had come to them there, or the plaintiffs had sustained damages by the delay, they would have been liable in damages. The established usage and course of business became the rule of duty binding upon the agent in order to carry out the substantial end and object of the agency, and evidence of this uniform usage was competent, and was controlling in the case. (*Van Santvoord v. St. John, supra. Hinton v. Locke, 5 Hill, 437.*)

3d. It became impossible to comply with the directions of the principal, without the fault of the agent, and it was a case, therefore, for a departure from those directions; and within all the cases it is only an *unnecessary* departure that renders an agent liable, or avoids his acts.

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4th. The defendants really, as the result of the refusal, in consequence of inability of the "People's Line" to carry the freight, were in the possession of it as forwarders without any directions as to the route or means of conveyance, and therefore bound to exercise their discretion, and select the best that presented. The People's Line could not take it; but this was not known either to the plaintiffs or defendants at the time the direction was given, and it was as if no direction had been given. It was as if there had been no "People's Line," or their means of transportation had been destroyed between the giving of the directions and the arrival of the goods at Albany. The direction was given in good faith, but was impossible of execution, and what is the innocent forwarding merchant to do? He has to adopt a course without the aid of the property owners. They have intimated, by their consignment, a desire that the property shall be sent to New York, and the presumption is that the desire is that it shall be forwarded without delay or the expense and risk of intermediate storage. I think the duty was obvious to carry out, as near as might be, the plainly declared intentions of the principal. There was no time to be lost; the boat on which the freight was shipped was the last tow that went down the river, in the fall of 1854. A delay for instructions would have lost the opportunity. The freight by the river was 6 cents per hundred pounds; by rail road the charge would have been 25 cents per hundred pounds. The rule must be the same as to the duties and powers of the agent whether the owner and shipper of the goods resides within fifty or five hundred miles of the forwarding merchant, if he is not in fact present so as to be able to be counseled on the spot.

The judgment should be reversed and a new trial granted, costs to abide the event.

[ONEIDA GENERAL TERM, JANUARY 5, 1857. *Hubbard, Pratt, Bacon and W. F. Allen*, Justices.]

THE SYRACUSE CITY BANK *vs.* TALLMAN and others.

Where the owner of premises, leased by him for a term of years, at an annual rent of \$1500, executed a mortgage thereon to W., who assigned the same to the plaintiff, and the mortgagor, subsequently and before the mortgage debt became due, assigned to T. \$4500 of the rent first to accrue on the lease, of which assignment the plaintiff had notice; *Held*, in an action to foreclose the mortgage, that as between T. and the plaintiff, T. was entitled to the rents and profits of the premises, which accrued between the time when the mortgage debt became due and the time of the appointment of the receiver in the foreclosure suit; although it appeared that the mortgagor was insolvent, and the mortgaged premises were an inadequate security for the mortgage debt.

Unless there be a special clause to that effect, in a mortgage, the mortgagee has no lien upon the rents and profits; and as a general rule the mortgagor, until the sale, is entitled to remain in possession.

But courts of equity, under certain circumstances, will, after default, in an action for foreclosure and sale, anticipate the final judgment by the appointment of a receiver, and in effect put the mortgagee in possession and allow him to divert the rents and profits of the mortgaged premises from the hands of the mortgagor, and hold them as additional security for the payment of the mortgage.

To entitle him to this relief it must appear that the mortgaged premises are an inadequate security for the debt, and that the mortgagor, or other person liable for the mortgage debt, is insolvent.

This relief does not grow directly out of the relations of the parties, or the stipulations contained in the mortgage, but out of equitable considerations alone. It is not a matter of strict right, but is addressed to the sound discretion of the court.

It seems that when the mortgagor is insolvent, and fails to pay, at the day appointed, and the mortgaged premises are an inadequate security, as between the mortgagor and mortgagee it is within the equitable discretion of the court to allow the latter to intercept the rents and profits, for his better protection from loss. And that this is the utmost extent to which the relief has been granted, or to which it can be granted, within any admitted principle of equity.

Where a third person took, for a valuable consideration, an assignment of the rents of mortgaged premises, before any default had occurred in the payment of the mortgage debt, and before there was any reason to anticipate that the mortgagor would become insolvent; *Held* that his equity was superior to that of the mortgagee, upon the mortgaged premises proving inadequate to the payment of the mortgage debt.

A PPEAL from a judgment entered at a special term, after a trial at the circuit, before a justice of the court, without

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a jury. The action was for the foreclosure of a mortgage, dated April 11, 1854, given by Charles A. Wheaton and wife to Horace Wheaton, to secure the payment to him of the sum of \$10,000 in two years, with interest annually. The bond and mortgage were assigned by Horace Wheaton to the plaintiff on the same day, to secure the payment of his three promissory notes of \$5000 each, held by the plaintiff. The mortgage and assignment were properly recorded April 24, 1854. The mortgaged premises were leased by Charles A. Wheaton to William W. Teall, November, 1852, for ten years, at an annual rent of \$1500. Lease recorded December 21, 1852. On the 17th of February, 1855, \$4550 of the rent first to accrue after May 15, 1855, was assigned by Charles A. Wheaton to the defendant Tallman. Notice of the assignment was given to the cashier of the plaintiffs' bank on the 15th of May, 1855. The plaintiff, in the complaint, besides praying for a decree of foreclosure, asked for an injunction against the defendant Tallman, to restrain him from receiving the rent assigned, and that a receiver be appointed. An injunction was issued, but no receiver was appointed until the final decree was made, which was on the 21st Nov. 1856. Both the mortgagor and assignor and the maker and indorser of the notes were insolvent, and the mortgaged premises are an inadequate security.

The judgment was for the amount reported due by the clerk, upon a reference to him for the purpose. It was also adjudged that the plaintiff was entitled to the rents from the time the mortgage became due, viz. April 11, 1856, and disallowed the claim of Tallman to any of the subsequent rents. The defendant Tallman appealed.

Charles Andrews, for the appellant. I. The bank, by the renewal of the notes for which it held the mortgage as security, without the consent of the defendant Tallman, and after notice of the assignment of the lease to him, released any right it may have had, to priority of payment, out of the rent accruing upon the lease.

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II. The defendant Tallman, as assignee of the rent, is entitled to all the rent which had become due on the lease before the actual appointment of a receiver in this action. (*Howell v. Ripley*, 10 *Paige*, 44. *Astor v. Turner*, 11 *id.* 436. 5 *id.* 38. *Welder v. Houghton*, 1 *Pick.* 88. 5 *Sandf. S. C. R.* 450. 6 *Barb.* 133.) This question may be considered in two views: 1st. Where a lease is executed subsequent to the mortgage. 2d. Where a lease is executed prior to the mortgage. (1.) The case of *Pope v. Briggs*, (9 *Barn. & Cres.* 245,) decided that a mortgagee, after the mortgage became due, was entitled to rents accruing after notice to the lessee of the forfeiture of the mortgage, upon a lease subsequent to the mortgage. This was on the principle that the legal estate and the immediate right of entry was in the mortgagee, upon forfeiture, and that if the lessee continued in possession after notice, he should be held to be a tenant of the one entitled to the possession. This case has, however, been overruled in *Partington v. Woodcock*, (5 *Nev. & Man.* 672,) where it is held that while a tenant could, under such circumstances, protect himself by payment to the mortgagee, he was not bound to account to him. (*McKircher v. Hawley*, 16 *John.* 289.) (2.) When a mortgage has become due, the mortgagee is not entitled to the rent upon a lease executed prior to the mortgage, unless there has been an entry by the mortgagee, or in case of an equitable mortgage, what is equivalent, a decree of sale, and the appointment of a receiver. (*Ex parte Living*, 38 *Eng. Com. Law Rep.* 343.) The principle upon which, under the English law, the mortgagee is entitled to the rents, rests upon the fact that he is the legal owner of the estate, and after forfeiture is entitled to the immediate possession, or to the rents and profits, which are its equivalent. In this state, since the statute preventing a mortgagee from bringing ejectment, and giving him no right of possession before foreclosure, the mortgagee has no legal right to the rents and profits accruing, before he acquires an absolute title. The mortgagor or his lessee cannot be regarded as trespassers, and

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the mortgagor takes the rents as owner, and not as receiver for the mortgagee. (4 *Kent*, 171.) If he gains the possession, it must be by contract with the mortgagor, or by one with the tenant subsequent to the forfeiture, or by the aid of a court of equity, which aid would be afforded, when the pernancy of the rents and profits became indispensable to the mortgagee's indemnity. (*Id.* 172.) The doctrine that a court of equity, can now in this state, pending a foreclosure, interfere with the rents and profits, by the appointment of a receiver, when the mortgagee has not protected himself by covenants, seems to be inconsistent with the legal relation of the parties, and to be founded upon the principle that the mortgagee is the legal owner of the estate, which no longer exists. At all events, no lien was acquired by the plaintiff till the appointment of a receiver; and the quasi possession of the receiver is not a possession as owner of the reversion, or as the representative of such owner. He can, at most, only recover such rents as accrue during his possession.

III. No specific lien was acquired by the plaintiff upon the rents till the receiver was appointed. As to the rents due, the defendant Tallman had an absolute property in them, by virtue of his assignment from Wheaton. And the appointment of the receiver would not relate back, so as to deprive Tallman of the rents which had accrued. (5 *Sandf. S. C. Rep.* 450.)

IV. The defendant Tallman is entitled to collect and receive rents sufficient to satisfy his entire claim, before any application of them is made upon the plaintiff's mortgage. The plaintiff took the mortgage with notice of the lease to Teall. When the defendant took the assignment from Wheaton, of the rents to accrue on the lease, no default had occurred in the condition of the mortgage. The mortgage was not taken upon the faith of Wheaton's remaining the owner of the lease, and by its terms it does not convey the rents. By the mortgage, the plaintiffs acquired no lien on the rents, and Tallman, having become a bona fide purchaser of the rents, before any

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lien was acquired by the plaintiff, is entitled to priority until payment of his debt.

Wm. J. Hough, for the plaintiff. I. The judgment is clearly right. The facts in the case entitled the plaintiff to a judgment of foreclosure and sale, and for the amount of the mortgage debt against the parties personally liable to its payment, and to the rent which accrued after the mortgage debt became payable, in case of a deficiency. The complaint was taken pro confesso against all the defendants, except Tallman. The amount due upon the bond and mortgage was regularly computed and reported, pursuant to an order of reference. What right has the defendant Tallman to question it? Clearly none, under the evidence given in his behalf upon the trial, except as to the rent.

II. The plaintiff is entitled to the rents, under the facts found, which have accrued since the mortgage debt became payable, in case of a deficiency, as is adjudged. (*Woodfall's Landlord and Tenant*, 465. *Chambers' Land. and Ten.* 581. 4 *Kent*, 165, 6. 5 *Paige*, 38, 42. 8 *id.* 565, 568. 11 *id.* 436, 437. 3 *Sand. Ch. Rep.* 69, 71, 72.) The lease was assigned to Tallman, after the recording of the mortgage, and he, as assignee, took and possesses the same rights which he could have taken as grantee of the mortgaged premises, and no greater, subject to the possession of the lessee, and to the lien of the mortgage. He stands in the place of the mortgagor, and has no superior rights. (*Woodf. L. and T.* 557, 8.) And it is well settled, that the mortgagee's right to the rents which remain unpaid, are superior to that of the grantee of the mortgaged premises. (3 *Sand. Ch.* 71.)

By the Court, PRATT, J. It is somewhat difficult to understand upon what principle the decision at special term was based. If I do not mistake the purport of the judgment, the quarter's rent due May 15th, 1856, was apportioned, the defendant Tallman being allowed rent to April 11th, the day

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upon which the mortgage became due, and the plaintiff the rent for the remainder of the quarter and subsequently. If upon default in paying the money due upon the mortgage on the 11th of April, the bank was entitled to the rents which should subsequently accrue, it was entitled to the amount for the entire quarter ending May 15th. It was at that time, and not before, that the quarter's rent accrued. No rent for that quarter could be said to accrue before that time.

Again ; costs of the litigation were allowed to Tallman, although he is substantially beaten in the suit. And if he was entitled to costs at all, he should have recovered of the plaintiff ; but instead of that, the judgment directs them to be paid out of the fund, which was substantially directing them to be paid by the Wheatons, who did not litigate at all, but suffered judgment to go by default. Stronger still, the plaintiff is allowed full costs of a litigated suit, with some two or three hundred dollars extra costs to be paid out of the land ; in other words, to be paid by the Wheatons. Here are two parties getting up a severe litigation on a collateral matter, and both are allowed costs and extra compensation to the amount of four or five hundred dollars, to be paid by the parties that had no interest in the litigation, and who suffered judgment to go against them by default. These matters are not before us upon this appeal, and were undoubtedly the result of some arrangement on the part of the counsel, to which the attention of the court was not probably called. Still they appear in the record. I have attended to them in order that it may appear that such practice does not meet with the approbation of the court.

But the principal question in this case arises out of the claim of the parties to the rents which accrued between the time when the mortgage became due and the time of the actual appointment of a receiver.

At common law the mortgagee was deemed to be vested with the legal title, and had the right to take the immediate possession of the mortgaged premises. The mortgagor in possess-

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ion was deemed simply a tenant at will, or rather at sufferance, and hence the mortgagee could sustain ejectment against him to recover possession, without notice to quit. In equity the relations between mortgagor and mortgagee were deemed very different. There the mortgagor was deemed the owner, the mortgage being deemed a mere personal security, and the mortgagee was considered as having merely a lien or security for the payment of the mortgage debt, which he could enforce by foreclosure. These equitable considerations of course were not without their effect upon even the legal rights and remedies of the parties; so that in courts of law the mortgagor in possession could not be deemed a trespasser, nor compelled to account for the rents and profits which he had actually received while in possession. Yet the mortgagee, under his right to enter, could thus intercept at any time the receipt of accruing rents. And when the premises were in possession of a tenant who had entered under the mortgagor, prior to the mortgage, the mortgagee, by giving him notice, could compel him to pay the rent to him. At one time this right was supposed to exist, whether the lease was prior or subsequent to the mortgage; but the later cases make a distinction, holding that without a voluntary attornment to the mortgagee by a tenant under a lease subsequent to the mortgage, there is no relation of landlord and tenant existing between them. In case of a prior lease the mortgagee, by giving the tenant notice of his mortgage, could require the latter to pay him as well unpaid rent which had accrued subsequent to the mortgage as that which should thereafter accrue. (*Platt on Leases*, 165.) In this state the principles of the rule in English courts of law and equity have been essentially changed. Even before the revised statutes, ejectment could not be sustained in our courts by the mortgagee without notice to quit, and under those statutes the right to maintain ejectment is wholly taken away. The mortgage is now, both at law and in equity, in this state deemed simply a lien for the security of the mortgage debt; the mortgagor being deemed vested with the legal estate, both

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at law and in equity. (2 *Paige*, 68. 5 *Wend.* 602. 2 *Barb. Ch.* 119. 11 *Paige*, 503. 3 *Denio*, 232.) Under this radical change in the relations which formerly existed between the parties, the legal remedies of the parties, as against each other, must necessarily be materially modified from what they were under the English rule.

The power contained in the mortgage simply authorizes the mortgagee, upon default of payment, to sell the premises at public auction, and to apply the proceeds of such sale to the payment of the mortgage debt. Unless there be a special clause to that effect, the mortgagee has no lien upon the rents and profits; and as a general rule the mortgagor, until the sale, is entitled to remain in possession. Hence it was held in *Ensign v. Colburn*, (11 *Paige*, 503,) that the mortgagee has no lien upon timber cut upon the premises in good faith, though the latter was at the time insolvent, and the premises were an insufficient security for the mortgage debt. Nor has he at law any remedy for the rents; for until sale he has no legal right to the possession. The power of sale only contemplates an appropriation of the proceeds of the sale of the premises to the payment of the debt. (10 *Paige*, 44. 5 *id.* 42. 8 *id.* 565. 6 *Barb.* 133.)

But courts of equity, adhering to the ancient practice, under certain circumstances will, after default in an action for foreclosure and sale, anticipate the final judgment of the court by the appointment of a receiver, and in effect put the mortgagee in possession and allow him to divert the rents and profits of the mortgaged premises from the hands of the mortgagor, and hold them as additional security for the payment of the mortgage. To entitle him to this species of equitable ejectment it must appear that the mortgaged premises are an inadequate security for the debt, and that the mortgagor or other person liable for the mortgage debt is insolvent. This relief, it will be readily seen from the conditions necessary to its enjoyment, does not grow directly out of the relations of the parties or the stipulations contained in the mortgage, but out of equitable con-

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siderations alone. It is not therefore a matter of strict right, but is addressed to the sound discretion of the court. When the mortgagor is insolvent and fails to pay at the day appointed, and the mortgaged premises are an inadequate security, as between the mortgagor and mortgagee it might well be deemed within the equitable discretion of the court to allow the latter to intercept the rents and profits, for his better protection from loss. And this simple case seems to me to be the utmost extent to which this relief has been granted by the court in the cases, or to which it can be granted, within any admitted principles of equity.

When other parties have acquired rights before default, and especially before the happening of those contingencies which give the mortgagee any right to such relief, that is, when the right or interest of the third party accrued before the insolvency of the mortgagor, conflicting equities may arise between which the court would not decide, but leave the mortgagee to his direct remedy by judgment. And under such circumstances I find no case in the courts of this state in which the court has given the mortgagee this equitable possession of the premises before final judgment, or by such final judgment has given him possession *nunc pro tunc*, so as to enable him to collect rents which had previously accrued.

In the case of *The Bank of Ogdensburgh v. Arnold*, (5 Paige, 38,) a portion of the mortgage debt only was due, and the premises were capable of being sold in parcels, and although the premises were not sufficient to pay the debt, and the mortgagor had died insolvent, the court, after decree, refused to allow the whole premises to be sold, or to let the mortgagee into possession. The chancellor held that the mortgagee had no specific lien upon the rents and profits of the mortgaged premises until the whole amount should become due. He remarked, that if the whole debt had become due, a receiver of the rents and profits might have been appointed, in anticipation of a decree, but in that case the question arose

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between the mortgagee and the widow and heirs of the mortgagor.

In the case of the *Sea Insurance Company v. Stebbins*, (8 *Paige*, 565,) the suit was between the mortgagor and mortgagee. The court, although it denied the receiver, reiterate the general doctrine announced in the *Bank of Ogdensburgh v. Arnold*.

In *Astor v. Turner*, (11 *Paige*, 436,) the receiver was appointed after decree. Besides, it does not appear in that case whether the defendants were themselves liable for the mortgage debt or not. So in *Lofsky v. Maujer*, (3 *Sandf. Ch.* 69,) the question arose between the mortgagee and a purchaser from the mortgagor subject to the mortgage. Whether he had assumed to pay the debt or not does not appear from the case. The assistant vice chancellor seemed to consider the defendant in precisely the same condition as the mortgagor would have been. He held that the mortgagee was entitled to all the rents that had accrued, after the mortgage become due, and he remarked that a court of chancery would restrain a mortgagor or his grantee from collecting the rents accrued, as well as those to accrue. If the grantee mentioned here is to be understood as a grantee of the equity of redemption merely, and especially a grantee who assumed to pay off the mortgage, he would stand, to all intents and purposes, in the same condition of the mortgagor, and no fault can be found with the doctrine. If he designed to go further, then his decision is in conflict with the two cases to which I will now allude. In the case of *Howell v. Ripley*, (10 *Paige*, 43,) the mortgagee in a junior mortgage filed a bill of foreclosure and procured the appointment of a receiver, who collected the rents. Previous to the appointment of this receiver, the senior mortgagee had also filed his bill of foreclosure, and after the collection of the rents, he procured the same person to be appointed receiver in his suit. After decree and sale of the premises, he moved the court for directions to the receiver to apply the rents so collected in satisfaction of the deficiency which was left, upon

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his mortgage, the proceeds of the sale not being sufficient to satisfy the whole of it. The vice chancellor granted the motion, but the chancellor, upon appeal, reversed it, holding that the mortgagee in the second mortgage was entitled to it. These funds in the hands of the receiver were in the nature of funds in court; and if by default in the payment of the mortgage any equitable lien or rights to the rents and profits accrued to the first mortgagee, it is difficult to see why the court did not give them to him. But the chancellor held that by the appointment of the receiver the second mortgagee had substantially obtained possession, and was not therefore liable to account, and that it was only by the appointment of the receiver that a specific lien was obtained by the senior mortgagee. It will be noted in this case that the bill to foreclose the prior mortgage was filed before the appointment of the receiver in the suit upon the second mortgage; and as the rents and profits were substantially in court, if forfeiture for non-payment or the filing of the bill was of any avail to create a lien, the senior mortgagee, it would seem, would have been entitled to the funds.

The case of *Zeiter v. Bowman* (6 Barb. 133) is more directly in point. In that case, during the pendency of the foreclosure suit, the mortgagor leased the premises and took from the lessee a chattel mortgage to secure the payment of the rent, and afterwards assigned the mortgage, and the rent to accrue, to one Bowman, the defendant. After an installment of rent became due, a receiver in the foreclosure suit was appointed, but without notice to Bowman, and the tenant attorned and paid the rent to him. Bowman afterwards took the goods, upon the chattel mortgage, for the non-payment to him of the rent. The tenant brought replevin, and upon demurrer to the replication the question was whether the tenant was justified in paying the rent to the receiver. The court, at general term, sitting in this district, held that he was not. Judge ALLEN, in giving his opinion, held that the claim of the mortgagee to the rents and profits was not a matter of

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right, founded upon his contract, but an equitable claim addressed to the sound discretion of the court, and that having taken no specific lien upon the rents the complainant had no equitable right to them, as against Bowman who had taken an assignment of them; that it was clearly so up to the time of the application for the tenant to attorn; that all he had a right to then was the immediate possession of the premises, but that he was not entitled in any event to an order, especially as against the equitable rights of third parties, which should have the effect to vest in him the possession, *nunc pro tunc*, as of a time long anterior to the application.

In the case at bar, Tallman took, for a valuable consideration, an assignment of these rents, long before default in the mortgage and before, for aught that appears in the case, there was any suspicion of Wheaton's becoming insolvent, and therefore stands in a position supported by quite as persuasive equities as Bowman was in the case above cited. There cannot, it seems to me, be any doubt in regard to the rent which became due on the 15th of May and before the commencement of the suit, and I have but little doubt in regard to that which accrued before the appointment of the receiver.

I think Tallman has at least the prior equity, and that the judgment at special term should be reversed, so as to allow him to receive the rents and profits which had accrued up to and including November 15th, 1856, with costs of the appeal.

[JEFFERSON GENERAL TERM, April 7, 1857. *Hubbard, Pratt and W. F. Allen*, Justices.]

THOMAS WALKER, President of The Bank of Utica,
vs. PAINE.

The condition of a mortgage was that the mortgagor should pay "the just and full sum of all moneys," which he might owe to the mortgagees, "either as maker or indorser of any note or notes, or any bills of exchange, bonds, checks, overdrafts or securities of any kind, given by him, according to the conditions of any such writings obligatory executed by him to the mortgagees, as a collateral security." *Held* that the instrument called for written evidences of debt, signed or indorsed by the mortgagor, and could be satisfied by no other; and that it could not be made available as a security for a debt not in writing.

Held also, that in the absence of any misrepresentation of facts, upon which the holder of the mortgage or any person through whom he claimed had been induced to act or to withhold action, to his detriment, the mortgagor was not *estopped* from denying the existence of such a written security as would answer the condition of the mortgage.

A PPEAL from a judgment entered at a special term, upon the report of a referee. The action was brought to foreclose a mortgage executed by the defendant, Rodney C. Paine, on the 27th day of July, 1841, to the Farmers and Mechanics' Bank of Michigan, to secure the payment of the sum of \$2500. The mortgage was recorded in August, 1841, and was assigned to the plaintiff on the 20th of November, 1851. The condition of the mortgage was as follows: That in case the mortgagor should pay "the just and full sum of all moneys which he may owe to the said parties of the second part, either as maker or indorser of any note or notes, or any bills of exchange, bonds, checks, overdrafts or securities of any kind, given or indorsed by the party of the first part, [the defendant,] together with the interest on the same, according to the conditions of any such writings obligatory, executed by the said party of the first part, to the said parties of the second part, as a collateral security, then these presents, and the said writings obligatory, shall cease and be null and void. But in case of the non-payment of the said writings obligatory, of whatever nature, or of any part thereof, according to their respective conditions, or of the interest thereon, or any part thereof, at the times limited for the payment thereof, then and in such

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case" the premises may be sold, &c. The complaint alleged, on information and belief, there was due on the mortgage on the 30th day of July, 1842, \$2500 and interest, "for and by reason of the failure of the defendant to comply with the conditions of the mortgage, and that said indebtedness accrued to the Farmers and Mechanics' Bank against the defendant as maker or indorser of notes or bills, or by reason of bonds, checks, overdrafts or securities given by or indorsed by said defendant, on or before July 27, 1841, the day the mortgage bears date." That the defendant failed to comply with the conditions of the mortgage, by omission to pay the said \$2500 due thereon July 30, 1842. There was no allegation in the complaint that any written evidence of the debt, or any debt save what was evidenced by the mortgage itself, was transferred to the plaintiff, or that the plaintiff owns any other. The answer alleged that no consideration was in fact paid by the bank for said mortgage, at any time. It denies that the defendant is, or was at any time, indebted to the bank in any sum, either as maker or indorser of any note or notes, or of any bills of exchange, bonds, checks, overdrafts or securities of any kind, given by or indorsed by the defendant, according to the conditions of any such writing obligatory executed by the defendant to the bank. It alleged that when the mortgage was executed, the defendant did not owe the bank any sum on any such securities, nor any sum according to the condition of any such securities, and that there is nothing due to the mortgagee or plaintiff on the mortgage. That the Bank of Michigan never assigned or transferred to the plaintiff any securities named in the condition of said mortgage, or any debt or demand the mortgage was security for; and that the defendant had not failed to comply with the conditions of the mortgage.

The action was brought against Paine and wife, and the Farmers' and Mechanics' Bank of Michigan. It was subsequently discontinued, as to all the defendants except Paine. The cause was referred to Timothy Jenkins, as referee, who by his report found the following facts, among others: That

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the defendant, Paine, executed to the said Farmers and Mechanics' Bank of Michigan the mortgage referred to in the pleadings, of the date of July 27, 1841, and for the purposes set forth in the condition of the said mortgage, which mortgage was duly acknowledged and recorded at the times indicated by indorsements thereon. That in 1834 the Farmers and Mechanics Bank, being authorized so to do by the legislature of the state of Michigan, established an agency at St. Joseph in said state, and continued to transact business at its said agency to 1844, when said bank, under like authority, established an agency at Niles in said state. That the defendant, Paine, was cashier of said agency at St. Joseph, from 1836 to 1844, and afterwards of the said agency at Niles, from 1844 to some time during the year 1851. He was in the employ of said Farmers and Mechanics' Bank, as such cashier, upon a salary; and during several of these years, in addition to his business as cashier, he laid out large sums of money belonging to the bank, in produce business and otherwise, for the benefit of the Farmers and Mechanics' Bank, and under its authority. That in 1851 the said bank agencies were brought to a close, and Paine surrendered, in the spring of that year, and delivered over to the parent bank at Detroit, the books, evidences of debt and the effects belonging to the bank. Among other things so surrendered he delivered over mortgages to the amount of \$10,214.14, and included among these mortgages was the mortgage of the date of 27th July, 1841, above mentioned; and also the mortgage bearing date February 15, 1842, referred to in the pleadings, was also delivered over at the same time by Paine to the parent bank. That on the 30th day of July, 1842, Paine was indebted to the Farmers and Mechanics' Bank in the sum of \$2500, which was proved by his entries in the books of the Farmers and Mechanics' Bank, kept at the establishment at St. Joseph, which sum, leaving out of consideration his claim for extra services, has never been paid by him. That this sum of \$2500 was indorsed upon the wrapper by Paine, covering the two mortgages, and the same

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indorsement was on the wrapper covering the mortgages, when Paine delivered them to the parent bank, and was embraced in the account of the sum of \$10,214.14 above mentioned. That the said two mortgages were transferred to the plaintiff on the 20th day of November, 1851, and the plaintiff is now the lawful owner of them and each of them. The referee found, as conclusions of law, 1. That the evidence of the indebtedness of Paine to the Farmers and Mechanics' Bank, was equivalent only to a parol admission by him that he owed the said bank the \$2500. 2. That the condition of the mortgage bearing date July 27th, 1841, contemplated and covered no other indebtedness than such as might be evidenced by some written instrument, signed or indorsed by said Paine, and did not contemplate and does not cover, in terms or effect, the said \$2500, or any part thereof. 3. That the defendants Rodney C. Paine and Abigail W. his wife were entitled to judgment in their favor against the plaintiff, and for their costs of this action.

The plaintiff appealed from the judgment.

Ward Hunt and *M. H. Throop*, for the appellant. Upon the facts clearly proved before the referee, and concerning which there was no conflict of evidence, the plaintiff was entitled to recover, and the report in favor of the defendant was erroneous. I. The proof made out a *prima facie* case for the plaintiff, and the report for the defendant was therefore erroneous as matter of law. The evidence raised three legal presumptions: Paine's acts and admissions; the indorsement, "bonds and mortgages," upon the wrapper; the judicial notice which courts take of ordinary commercial usages, (10 *Barb.* 406;) raised the presumption that the instruments called for by the mortgage had at one time been executed by Paine. The affirmative proof that all the securities remained in his hands for nine years, and that in 1851 he surrendered nothing except these mortgages, coupled with the same acts and admissions, raised the presumption that he still retained the

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other instruments, or had destroyed them ; or, to say the least, the affirmative proof that he did not surrender them to us, cast upon him the onus of accounting for them. And the presumption arising from their suppression, or the failure to produce or account for them, would be that, if produced, they would satisfy the condition of the mortgage. The report was a finding in opposition to these legal presumptions, and was therefore erroneous as matter of law. (1 *Greenl. Ev.* § 33. 1 *Cowen & Hill's Notes*, 308, 309. 6 *Peters*, 622, 632, 633. 14 *Barb.* 284, 303, and cases cited.)

II. The defendant was estopped as against the Farmers and Mechanics' Bank, our assignor, from interposing the defense that no such securities existed. The correct definition of an estoppel is contained in 3 *Hill*, 215, 222, and 12 *Barb.* 128. This case contains all the requisites of an estoppel. The admissions made by him are inconsistent with the claim he now sets up. The other party acted upon these admissions ; and the other party will be injured by allowing the truth of the admission to be disproved. These two propositions belong together. Relying upon these admissions, the Farmers and Mechanics' Bank settled Paine's account, both expressly and by acquiescence. (1 *Kern.* 170.) This settlement is conclusive, and can only be opened by the bank on an allegation of fraud or misrepresentation by Paine, which certainly he cannot call upon the bank to make. The bank therefore lost its action against Paine, and confined its remedy to these mortgages as representing the debt. Can he be heard now to say that they represent nothing? Relying on the admissions made to John A. Welles, the cashier before 1845, the bank suffered the statute of limitations to run against the debt. This appears by an irresistible implication. On the faith of the same representations, they transferred the mortgages and guarantied their collection. They will thus be compelled to pay a heavy bill of costs, if the plaintiff fails. And the mere bringing a suit on the faith of the representations, satisfies the rule. (*Presbyterian Church v. Williams*, 9 *Wend.* 147.)

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III. If the question is still open, we contend that the indebtedness which we proved satisfied the condition of the mortgage. The referee erred in his conclusion that the mortgage (schedule A) called for a written security. The provisions of its condition are so repugnant to each other, that it can hardly be said to have any legal construction; but a careful analysis of the language used, results in establishing the following propositions: The debts which it is conditioned to pay are such as accrue against Paine as "maker or indorser" of the articles enumerated. He could not be a maker (in a technical sense) of a "bill of exchange," "bond," "check," "overdraft," or "security," (other than a note,) nor could he be the indorser in any sense of a "bond," "overdraft" or "security." Therefore the word "maker" must be used in its popular and not its technical sense. They are to be "given or indorsed by" Paine. It is manifest that "given" is the verb applicable to "maker," as "indorsed" is to "indorser." "According to the condition of any such writings obligatory." A "writing obligatory" is a bond or other sealed instrument, (1 *Parsons on Cont.* 6; *Chitty*, 1;) so that this phrase makes nonsense of what precedes it, unless the words "when they are writings obligatory" are added. The mortgage then clearly includes in its condition the case where Paine is the "maker of an overdraft." The mortgages were given July 27, 1841, and February 15, 1842. They manifestly embrace past debts and future debts. On or before the 30th July, 1842, Paine had taken out of the bank \$2500, which he had not accounted for, as a careful examination of the extracts from the books will show. Was not this an "overdraft?" An "overdraft," in the banking business, is an excess of debtor over creditor in a customer's or officer's account. Usually it is caused by too many checks being drawn; but even then the checks are not the "overdraft," but only evidence of it. Sometimes it is caused by charging a note, &c.; sometimes by oral directions to charge expenses in matters in which a depositor is interested. In each case the account is overdrawn. Has not a bank offi-

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cer overdrawn his account when he takes money from the till, beyond his salary, and charges it to himself? The mortgage (schedule C) stands admitted of record, and proved in fact, to have been given as collateral security for the same debt as schedule A. Limiting as before the provision as to "writings obligatory," and there remains a condition to pay "debts of any and every nature." These two mortgages being a part of the same transaction are to be read together though they bear different dates, and schedule C qualifies and enlarges schedule A as between the parties, the rights of no third person having intervened. (*Coddington v. Davis*, 3 *Dento*, 16. 1 *Comst.* 186. 18 *John.* 420. 1 *John. Cases*, 91. 5 *Cowen*, 468. 21 *Wend.* 202. 1 *Paige*, 455. 3 *id.* 254.) Schedule A, therefore, included the debt in question: Because schedule C is to be read as if its condition was incorporated in schedule A. Because it was admitted of record, and proved that such was the intent of the parties. And upon the following general principles: The construction of the instrument is doubtful; and the court will resort to the extrinsic circumstances disclosed by the proofs, and construe the mortgage according to the intent of the parties apparent upon the proofs. (1 *Barb.* 635. 22 *Barb.* 326. 1 *Greenl. Ev.* §§ 277, 282, 286-288, 297. 2 *Cowen & Hill's Notes*, 1361, 1370, 71, 1404-1406.) In aid of the extrinsic facts the whole instrument is to be considered together, (in this case the two instruments,) and, in doubtful cases, the construction most favorable to the covenantee is to be adopted. (3 *John.* 375. 2 *Cowen*, 781. 6 *Barb.* 258. 16 *John.* 172. 8 *id.* 394.) Especially will such a construction prevail where the covenantor was the draughtsman, and at the same time the agent of the covenantee in the transaction. Finally, that construction is to be adopted which, upon the whole case, will enable the instrument to stand, rather than to fall. (3 *Cowen*, 384.) The entries in the books, and the indorsement on the wrapper, satisfied the terms of the mortgage. The referee does not disclose upon what clause of the instrument he bases his conclusion that a written instru-

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ment must be produced, nor what must be the character of that instrument; but if a mere writing, creating or evidencing a liability to pay, is necessary, we contend that we showed such a writing. The entries were in Paine's handwriting, and the wrapper was adopted by him. The transaction amounted to this: In 1841 Paine gives a mortgage conditioned to pay any debt thereafter to arise upon a written instrument. In 1842 he acknowledges in writing that he has borrowed, on the security of the mortgage, \$2500. In 1851 he repeats that acknowledgment. Has he not satisfied the condition of the mortgage? The entry was, at least, equivalent to an I. O. U., which contains no promise to pay. But an I. O. U. is evidence of money lent. (*Douglas v. Holme*, 12 *Ad. & El.* 641. 20 *E. C. L.* 320.)

Charles H. Doolittle, for the respondent. I. The condition of the mortgage which this action was brought to foreclose, covers no other indebtedness than such as might be evidenced by some written instrument, signed by or indorsed by the defendant, Paine. This condition is written in a printed blank mortgage; its terms, therefore, are not accidental, but designed and considered. It was competent for Paine, and it is not unusual, to secure a certain kind of indebtedness, and in clear and express terms this condition limits the security to particular kinds of debts. If designed to secure all debts he might owe the bank, why add the qualifying lines? The first two lines of the condition, "all moneys which he may owe to the said parties of the second part," would cover, without addition, all debts, but they are followed by express words of limitation. There was no use of the subsequent part of the condition, except to qualify and limit the first two lines above quoted, and they have no other effect. The words "made or indorsed" are used in their ordinary acceptance, when speaking of a note or bill. They do not refer to the person who filled out the instrument, but in some sense he is the maker. The terms refer to persons who in a partic-

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ular manner and way put their names to an instrument. The maker of any note, security or demand, is the person who signs, in contradistinction to a man who puts his name on the back, and indicates the man on the paper primarily liable. It is a common term, used in the manner and way it is in the condition, with a well defined signification. The words "given by, or indorsed by," are equally common, and have a well understood signification when used with reference to money demands. No matter how many hands a note has passed through, or how many may have indorsed or guaranteed it, or who held it; when the terms, "the person who gave the note," "the person by whom the note was given," are used, the person who signed it is intended. All demands by the terms of the condition which the mortgage was given to secure, are such as are signed or indorsed by the mortgagor. The words are, which he may owe, "as maker or indorser of any note," &c. or securities of any kind, "given by or indorsed by said party of the first part." The terms apply to each and every class or kind of indebtedness mentioned in the condition, and qualify and characterize them. Those terms properly apply to *written* instruments only. They apply in the condition only to written instruments which contain an agreement to pay money—instruments on which the defendant, as maker, or indorser, may owe money. The *complaint* does not claim or allege that the mortgage secures any debt, except such as is evidenced by some written instrument made or indorsed by Paine. The plaintiff and his counsel so understood and construed the mortgage at the time when the complaint was drawn.

II. When the terms of an instrument are plain and unambiguous, as the terms of this mortgage are, it must be construed by itself, and the rights of the parties determined by its language. In such case, neither the acts nor the declarations of the parties, not contained in the instrument, can effect its construction. (*Norton v. Woodruff*, 2 *Const.* 155. *Jackson v. Sill*, 11 *John.* 212. *Meads v. Lansing*,

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1 *Hop. Ch.* 124, 134. *Louber v. Le Roy*, 2 *Sand.* 202, 215.) The condition of this mortgage being plain and unambiguous, it is to be construed by its own language, and not by extrinsic evidence. It is the settled rule in England and in this country, that a regularly executed mortgage cannot be enlarged by tacking subsequent advances to it in consequence of any agreement by parol. (4 *Kent's Com.* 185, 8th ed. 19 *Ves.* 477. *Walker v. Snediker*, 1 *Hoff. Ch. R.* 146. 1 *Merivale's R.* 7. 2 *Kent's Com.* 731, 732.)

III. The extrinsic evidence, then, insisted on in this case to qualify or vary the terms of the mortgage so as to make it security for demands not included in or covered by its terms, effects nothing, and leaves the case as it stood without it, to be determined by the language of the mortgage itself.

IV. The mortgage in suit was not given or received by the Farmers and Mechanics' Bank in fact to secure any demands, except such as are named and stated in its condition. (1.) It is so alleged in the complaint. (2.) It is so found as a fact by the referee on the evidence, and that finding is not excepted to. (3.) If any debt has then been found owing by Paine to the bank, not evidenced by a writing, signed or indorsed by Paine, it is not to be considered in this action.

V. If the plaintiff recover in this case, he must recover on the case made by his complaint. If he alleges a certain breach of the condition of the mortgage by which he claimed a right of action, and claims to foreclose for that reason, he must prove it, or fail in his action. (*Brasill v. Isham*, 2 *Kern.* 9, 17. *Oakley v. Morton*, 1 *id.* 25, 33. 2 *Seld.* 179. *Bristol v. Rensselaer R. R. Co.*, 9 *Barb.* 158. *Parker v. Rensselaer and Saratoga R. R. Co.*, 16 *id.* 316. *Coan v. Osgood*, 15 *id.* 583.)

VI. The cause of action stated in the complaint was not proved, and it cannot fairly be pretended the plaintiff was entitled to any judgment on the case made by his complaint. (1.) This action was brought to foreclose the mortgage dated July 27, 1841, on the ground there had been a certain alleged

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breach of its condition—not of any contract outside of the terms of the mortgage, but of its condition. The breach of the condition of the mortgage alleged in the complaint, by reason of which alone it is therein claimed the plaintiff has a right to foreclose, is stated in the complaint as follows, to wit: "On the 30th day of July, A. D. 1842, there was due to the said corporation on said two mortgages, and by reason of the failure of the defendant, R. C. Paine, to comply with the conditions thereof, the sum of \$2500, and that the said Paine was personally liable therefor; the same having accrued to the said corporation against the said Paine as maker or indorser of notes or bills, or by reason of bonds, checks, overdrafts or securities given by or indorsed by the said R. C. Paine, on or before the 27th day of July, A. D. 1841. The defendant, R. C. Paine, has failed to comply with the conditions of the said mortgage by omitting to pay the sum of \$2500 due thereon on the 30th day of July, 1842." It will be observed no omission to pay any debt not mentioned in the condition of the mortgage is alleged, and that the allegation is an omission to pay \$2500 which accrued or became due to the bank on certain instruments signed or indorsed by the defendant, and held by the bank July 27, 1841. No such breaches are proved or found by the referee, and there is no exception to the referee's finding or omission to find on that point. There is no evidence any where that the bank had any such securities of the defendants, July 27, 1841. There is no evidence that Paine owed the bank any sum July 27, 1841, or before that time. There is no evidence that the Farmers and Mechanics' Bank held or owned any such securities signed or indorsed by Paine when it assigned the mortgage; or that either bank has held any since; or that any sum is due by the terms of any such instrument. In fact it is nowhere proved that there is any debt owing to either bank by Paine, on which there is any thing due, or for which there is a present right of action. The referee finds that Paine owed the Farmers and Mechanics' Bank \$2500, July 30, 1842, which he finds is proved by the entries in bank

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books copied into the case, not covered by the mortgage. But on what terms was that debt contracted? When was it due? The evidence of that debt was, and the referee so reports, the entry in the books of the bank, signifying that the bank, July 27, 1842, loaned on a bond and mortgage of Paine, to some person, \$2500. When and on what terms that \$2500 was payable, will depend on the terms of that bond and mortgage. The Farmers and Mechanics' Bank assigned to the plaintiff a bond of Paine's. Perhaps that would show, when given in evidence. But the fact that the bank made a loan on a bond and mortgage made by Paine, by no means shows a present right of action. Nor can the debt created by the loan be proved otherwise than by the bond and mortgage. The debt is all merged in them.

VII. It was claimed on the trial that the entries in the books of the bank in evidence constituted a security, a written obligation within the condition of the mortgage. That claim is untenable. There is no charge in the bank books, to Paine. The bank kept what is called a bond and mortgage account; that is, an account with its bonds and mortgages, in which charges and credits were made to bonds and mortgages. When the bank purchased a bond and mortgage, that account was charged with the amount which was paid for it, signifying that the bank had invested so much in the bond and mortgage, and the cash account was credited that amount, showing that that amount had been invested out of the money on hand. The bank has a bills receivable account; when it discounts a note, it charges the amount paid to bills receivable, and credits the amount to cash out of which the discount is paid. In neither case is it a charge to or an account against any one. In the one case the note is the only debt, security or demand the bank has for its money, and in the other, the bond and mortgage. The entry in the book is the bank's minute of its transactions for its own convenience, showing what it has paid out and what it has received. These entries, then, are not even an account against Paine; but if it was a party's own account

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against another, it is not such a security or obligation as is named in the condition of the mortgage. If any such entry could be tortured into a writing obligatory, this is neither signed by or indorsed by Paine, and for that reason would not come within the condition of the mortgage; nor does it contain any terms or conditions, &c. The non-payment of it, then, is no breach of the condition of the mortgage. A security, in the sense used in the condition, is an instrument by which one party secures by his own agreement the payment of money. A writing obligatory is technically a sealed instrument; it means, in this condition, a written instrument containing a promise to pay money. The entries in the books are not in any respect evidence that Paine owes the bank any sum, but they indicate that the bank loaned some person not named \$2500 on a bond and mortgage made by Paine.

VIII. It was claimed on the trial that an overdraft was proved. That claim is untenable. When a man draws a draft on another for more money than the other owes him, it is an overdraft. No such thing is proved or attempted to be proved here. Certainly an overdraft is something besides getting a note or bond and mortgage discounted.

IX. The plaintiff has not excepted to the finding of the referee on questions of fact, but to his conclusions of law. Those conclusions of law excepted to are warranted by the facts found, and are right. *The evidence* that Paine owed the bank \$2500 is equivalent only to a parol admission by him that he owed the bank \$2500. That evidence was the entries on the bank books and the indorsement on the wrapper; neither of which were signed by Paine, or expressed any promise to pay. Certainly that is no more than an admission by Paine that he owed the \$2500. It is not that. *The condition* of the mortgage of July 27, 1841, covered no other indebtedness than such as might be evidenced by some written instrument, signed or indorsed by Paine. That conclusion was right, for the reason stated in our first point, that the condition of the mortgage did not cover the said sum of \$2500.

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This conclusion follows of course from the first two conclusions found by the referee above stated. It was not pretended on the trial that it was due or owing upon any instrument signed or indorsed by the defendant, of which any evidence had been given. The exception that the referee did not find as a fact proved by the evidence that it was the intention of the parties the \$2500 should be secured by the mortgage, is not tenable, as there was no such issue, and he was not called upon to find one way or the other on that point. The mortgage is alleged in the complaint to have been executed and delivered to the bank, July 27, 1841. The \$2500 debt, if contracted at all, was contracted July 30, 1842, a year after the mortgage was executed. The entry in the bank books of that date, where he is charged with \$2500, shows that there was no such debt existing prior to that, in such securities; but the demand is on a debt then created, if any.

X. The plaintiff was not entitled to recover on the evidence, even if securities covered by the condition of the mortgage had been given for the \$2500. (1.) They were not transferred to the plaintiff. The mortgage is an incident and passes with the debt it is given to secure. (9 *Wend.* 80 and 84. 5 *Cowen*, 202 and 6.) It is nothing without the debt. It could be enforced only to pay the debt. It is alleged by the plaintiff that the Farmers and Mechanics' Bank had no such securities when the assignment was made; if there were any, they may be owned by persons who can collect them. (2.) They were outlawed. The mortgage contains no personal covenant to pay them, and does not take them out of the statute of limitation. (3.) They were not proved. Their loss was not proved, nor their contents shown, &c.

By the Court, PRATT, J. It seems to be conceded by the counsel for the appellant that the mortgage cannot be made to cover debts or advances that do not come within the conditions of it; that if it appears, by the condition of the mortgage, that it was made to secure the payment of debts accruing

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upon written contracts or demands, it is not competent to prove by parol that it was in fact made to secure debts and demands resting only in verbal contracts.

The first question, therefore, to be determined is, whether the condition of the mortgage of July 27th, 1841, provides that it shall be a security for debts accruing upon some written contract or agreement signed or indorsed by Paine, or it is general, including also debts accruing upon a verbal contract.

It seems to me that the terms of the condition are too plain to allow of the application of any rules of construction. It seems to read as plain as language can be written. It is, "that if the said Paine shall pay the just and full sum of all moneys which he may owe to the said parties of the second part, either as maker or indorser of any note or notes, or any bills of exchange, bonds, checks, overdrafts or securities of any kind, given by or indorsed by the party of the first part, according to the conditions of any such writings obligatory executed by him, &c. But in case of the non-payment of such writings obligatory of whatever nature, according to the respective conditions thereof," &c., concluding in the usual form. If this does not call for written instruments, I confess I do not know what language could be employed that would call for such and *such* only. Besides, it was not the case of a printed blank which required erasures and interlineations to express the true meaning, and which, in the hurry of preparing it, might have been left to read differently from what it was really designed to express; but the condition was mostly written, and that too by the mortgagor himself. Taking the instrument as it reads, I think it calls for written evidences of debt, and can be satisfied with no other.

In the second place, Did the proof show any such debt? The question is not whether the circumstances were such that the existence of some such debt as is called for by the terms of the condition might be inferred, but whether there was such a preponderance of testimony establishing such debt as would authorize this court to set aside the report of the referee.

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Upon this point, after a careful examination of the testimony, I am unable to find any proof of such indebtedness. It is true we may conjecture that at some time there may have been a check, upon which the money had been drawn from the bank ; or there may have been a bond, but there is no legal proof of it. The books, which seem to furnish the most reliable testimony upon the subject, indicate that the money was advanced directly upon the mortgage, without any personal security. Both mortgages were made long before any money was advanced ; hence no personal security could have been given at the time of their execution. The entries in the books show that the \$2500 was advanced on the 30th day of July, 1842, some twelve months after the first, and some six after the second mortgage was executed. It is true the entry is made under the head of bonds and mortgages, but as part of the business of the bank was to discount bonds and mortgages, it would, most likely, be entered under that head if no bond had accompanied the mortgage. Indeed the complaint does not aver that any bond was in fact executed ; nor was it so contended by the counsel for the plaintiff upon the argument. It was insisted that the court might infer that some written security had been given to satisfy the calls of the condition in the mortgage, but it was not insisted upon that such security was in fact a bond. It was much more strenuously maintained that there was an overdraft, within the terms of the condition. But the inferences to be drawn from the evidence, I think, are strong that the money was advanced directly upon the mortgage, upon a discount of them to that amount. I cannot see how, by any correct use of the term, either commercially or legally, it can be called an overdraft. The report of the referee therefore is clearly sustained by the evidence.

But it is insisted that the defendant, under the circumstances, should be estopped from claiming that the debt is not secured by the mortgage. It is not very obvious to me upon what ground, or upon what portion of the evidence, this

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assumed estoppel can be placed. If the parent bank knew nothing of the absence of the requisite written security to answer the conditions of the mortgage, until 1851, it was equally ignorant of the existence of the mortgage itself, or of the debt which it was designed to secure. The knowledge of all came to the bank at the same time, and the transfer to the plaintiff was made with a full knowledge of all the facts. There was no misrepresentation of the facts by Paine, or any course of conduct on his part which induced any action on the part of the bank which it would not otherwise have taken.

The counsel for the plaintiff does not contend that this is a case where a court of equity should enforce the mortgage as a lien for the security of a debt created upon the faith of it as such security, although not literally within its conditions, and therefore I assume that the point, if taken, would be untenable.

But he insists that the defendant should be estopped from denying that there was such written security as would answer the condition of the mortgage. This position cannot be sustained. No misrepresentation of facts has been proved, upon which the plaintiff or any person through whom he claims has been induced to act or to withhold action, to his detriment. It is true the bank relied upon the mortgage as a valid security for the \$2500, not upon the assumption that there was a bond or other personal security in writing, but upon a mistaken idea of the law, in assuming that the mortgage might be made available as security for a debt not in writing as the condition thereof requires.

Judgment affirmed.

[OSWEGO GENERAL TERM, July 7, 1857. *Hubbard, Pratt, Bacon and W. F. Allen, Justices.*]

THE ILION BANK *vs.* CARVER and others.

On the 5th of January, 1855, C., a director in the Ilion Bank, pretended to sell to P., a person of little or no pecuniary responsibility, his stock therein, of the par value of \$15,000, for the sum of \$17,250. P., with the connivance of C. and the cashier, who was the son of C., immediately pledged the same to the bank as security for the payment of his note at ninety days, executed to the bank at the same time, for the sum of \$17,250, and received from the bank the latter sum in the bills of the bank. This was charged to have been done in pursuance of a conspiracy between the three to injure and cripple the bank in its business, and to enable C. to impose his stock upon the bank at a price much greater than it was really worth; and in consequence of these proceedings the bank was greatly embarrassed in its business, and C. did receive for his stock a sum far beyond its actual value. *Held*, that whether the transaction was treated as a willful violation of the duty which C. and his son, the cashier, owed to the bank, growing out of their official relations to it, or as a direct conspiracy to cripple and defraud the bank, the parties concerned in it were liable to the bank for the damages which it had sustained thereby.

Held also, that in an action by the bank directly against them, for damages, no laches on the part of the plaintiff, short of the statute of limitations, would constitute a defense.

Held further, that this was an executed contract, and that although the plaintiff might have been guilty of laches, and so lost its right to repudiate the transaction, yet that upon a complaint sufficiently broad to cover a claim for damages, it might maintain an action upon that ground, at any time allowed by the statute of limitations.

APPEAL from a judgment entered at a special term, by which the plaintiff was nonsuited, and the complaint dismissed. The following are the allegations in the complaint: In the early part of 1852, the plaintiffs were incorporated under the general banking act, and in August of that year commenced, and thence carried on the business of banking at the village of Ilion. The articles of association provided that the bank should be managed by eleven directors, who were to be elected annually, and who should be stockholders. That Benjamin Carver was one of the directors of the institution, and B. F. Carver its cashier, whereby it became and was the duty of the one as director, and the other as cashier, faithfully to discharge the duties and obligations of their respective

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offices, and faithfully and for the best interest of the bank, and pursuant to the laws of the state and the by-laws of the bank, to administer and use its funds, and to obey all lawful rules, regulations and by-laws of the bank. That at a meeting of the board of directors in July, 1852, a resolution was passed in the following words: "Resolved, that the Ilion Bank will not discount any note without two indorsers;" which resolution thereafter remained in force, forbidding the discount of the paper thereafter mentioned. That the defendants had notice of this resolution. That in January, 1855, there was dissatisfaction among the stockholders and directors of the bank, at the course theretofore pursued by the Carvers, in the discharge of their duties as director and cashier; and a party among the stockholders was forming to oust the elder Carver from his place as director, at the ensuing election in February, and elect a board of directors which should remove Benjamin F. from the office of cashier, if the new board should deem that proper; all of which was accomplished by Benjamin Carver ceasing to be a stockholder, and the resignation of Benjamin F. That Benjamin Carver held and owned 150 shares of the capital stock of the bank, until he disposed of it as thereafter stated, of the par value of \$100 per share. That on the 5th of January, 1855, the two Carvers fraudulently combined with Prescott to accomplish the wrongful and fraudulent purposes thereafter stated; and thereupon the three defendants, contriving and intending to defraud and injure the plaintiffs, and to sell the said stock of Benjamin Carver to, and impose the same upon the plaintiff, at a great premium, and at a price above its then value, and to convert to the use of one of them the money of the bank, the said Benjamin and Benjamin F., not regarding but violating their duty as such officers, and abusing the several trusts reposed in them, conceived and carried out a fraudulent and wrongful scheme, to accomplish such end and purpose; in pursuance whereof, on the 5th of January, 1855, Prescott bought from and Carver sold to him, his stock in the bank, at a price to

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the plaintiffs unknown; and thereupon, as a transfer of the same, said Benjamin Carver indorsed his name on the scrip and delivered it to Prescott. That on the same day, or within a few days thereafter, Prescott attached the scrip for the stock to an instrument executed by him, in the words and figures following, to wit:

“ 307.65 Interest.

\$17,250.

Mohawk, January 5th, 1855.

Ninety days from date, I promise to pay Eliphalet Remington, as president of the Ilion Bank, at the banking house of said bank, in the village of Ilion, for value rec'd, seventeen thousand two hundred and fifty dollars, with interest at the rate of seven per cent per annum, having deposited with and pledged to said president, as collateral security, one hundred and fifty shares of the capital stock of the said Ilion Bank, with authority to sell the same on condition this note is not paid at maturity; provided that the said one hundred and fifty shares of stock shall not be sold for less than the amount of this note and the interest which may have accrued thereon; and provided, also, that the said bank as aforesaid shall have recourse to the said stock hereby pledged only and solely for the payment of this note. (Signed) AMOS H. PRESCOTT.”

That he delivered the same to B. F. Carver as cashier of the plaintiff; “ who thereupon, as such cashier, and assuming to act for the plaintiffs in said transaction, without any indorser or surety, and without any other or further instrument or security for the repayment of the funds and money so advanced or delivered to Prescott, as hereinafter mentioned, pretended to discount the said instrument, and did thereupon pay, deliver and furnish, upon such instrument, to the said Prescott, or to some other person for the use of one of the defendants, the sum of \$17,250 of the moneys and funds of the bank, or did credit said Prescott upon the books of the bank with said sum of \$17,250 as deposited by him on that day, without the same having been deposited by him, except as aforesaid; and the said Prescott thereupon, either personally

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or by or through the medium of some other person, did pay to the said Benjamin Carver, in money or otherwise, the said sum of \$17,250, so received by him, the said Prescott as aforesaid." That the market value of the plaintiffs' stock, and the price for which it could have been fairly sold at the time of said transaction, and at the expiration of ninety days, was a much less sum than the amount at which it was so pledged to the plaintiffs. That *immediately* upon the transaction coming to the knowledge of the board of directors, and on the 1st of February, 1855, the said board passed resolutions, which are set out. That the transaction referred to in the resolutions is the same complained of; and that before the resolutions were passed, B. F. Carver had ceased to be cashier. That *shortly after and on or about* the 6th of April ensuing, copies of these resolutions, with a notice annexed, were delivered to the defendants respectively. That on the 14th of April, the money advanced upon the security remaining unpaid, the plaintiffs gave notice that the stock would be sold at auction on the 30th of April; at which time the plaintiffs did sell the same at auction to the highest bidder, for the sum of \$15,195, which fell short of the amount payable by the terms of the instrument, \$2362.65; and that this sum remains unpaid. The residue of the complaint consisted of allegations of special damages, &c. sustained by the plaintiffs; concluding with a demand for judgment for \$20,000.

The answer of the defendants B. Carver and Prescott severally denied the material allegations of the complaint. They alleged that Carver sold his stock to Prescott at its fair value, and that the latter, without the aid, privity or knowledge of the former, applied for and obtained the discount; and that B. F. Carver had authority to make it. They further alleged that the board of directors had notice and knowledge of the transaction on the 8th of January, and that they ratified and confirmed it.

P. Gridley, for the appellant.

F. Kernan and *C. H. Doolittle*, for the defendants.

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By the Court, PRATT, J. The complaint in this case charges that on the 5th day of January, 1855, Benjamin Carver, a director in the bank, pretended to sell to the defendant Amos H. Prescott, a person of little or no pecuniary responsibility, his stock therein, of the par value of \$15,000, for the sum of \$17,250; that Prescott, with the connivance of said Carver and the cashier, Benjamin F. Carver, immediately pledged the same to the bank, executing to it the instrument set out in the complaint, and received therefrom the sum of \$17,250 in the bills of the bank. This is charged to have been done in accordance with a conspiracy between the three to injure and cripple the bank in its business, and to enable Carver to impose his stock upon the bank at a price much greater than it was really worth; and that in consequence of these proceedings the bank was greatly crippled and injured in its business, and Carver did receive for his stock a sum much greater than its actual value. The evidence upon the trial tended to establish these allegations of the complaint. It was also proved that the transaction came to the knowledge of the other officers of the bank on the 8th day of January, at which time resolutions were passed to make a loan, and a committee was appointed to investigate the condition of the bank. On the same day Carver, the cashier, resigned. On the 13th another meeting was held, at which vacancies in the direction, occasioned by the sale of their stock by Carver and other directors, were filled and measures were taken for strengthening the condition of the bank. On the 1st of February resolutions were passed repudiating the whole transaction, and authorizing the attorney of the bank to tender back to Carver the stock and demand the amount of money received. A copy of the resolutions was not served upon the defendants until the 8th day of April. The defendants refusing to comply, the stock was sold at auction on the 30th of April, after due notice. This action was then brought, and the plaintiff was nonsuited at the circuit, on the ground that it had not been sufficiently prompt in repudiating the transaction.

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That there has been a very gross fraud perpetrated upon the plaintiff is, upon the case as developed at the circuit, beyond question, and the inquiry now is, has the bank by its laches precluded itself from redress?

An action on the case, if we may be allowed to use old terms, would generally lie in all cases where a wrong had been done to a person, from which he had suffered actual pecuniary loss. This principle is so elementary that it cannot be necessary to cite examples. It would therefore lie in all cases where a party had sustained loss in consequence of any fraud perpetrated upon him by the defendant, or of any willful violation of duty on the part of the defendant towards him, growing out of any relation between them, official or otherwise. (*Broom's Com.* 658.)

In the case at bar, whether the transaction be treated as a willful violation of the duty which the two Carvers owed to the bank, growing out of their official relation to it, or whether it be treated as a direct conspiracy to cripple and defraud the bank, it would seem that upon the most obvious principles of elementary law, the defendants should be held liable for the damages which the bank has sustained thereby. And in an action against them directly, for damages, I know of no laches on the part of the plaintiff, short of the statute of limitations, which would constitute a defense. The error in the ruling at the circuit, if any was made, arose from not recognizing the distinction between the remedies which the law gives to the party defrauded, against the wrongdoer. Fraud, it is said, vitiates all contracts, and renders them not absolutely void, but voidable in the election of the party upon whom the fraud has been perpetrated. He therefore has two remedies. 1st. He may repudiate the transaction, and by restoring or offering to restore what he has received, call upon the tortfeasor to restore also, and upon his refusal, may bring his action either in replevin or other form appropriate to effect such restoration. Thus in the sale of a horse, if the vendor is guilty of any fraud or deceit in regard to the condition or quality of

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the animal, the purchaser may return or offer to return the property and bring his action for the consideration paid. And if the party elects to resort to this remedy, he must do so in a reasonable time after he ascertains the fraud. But the party defrauded is not bound to repudiate the transaction. He has his election, and may treat it as valid, and bring his action to recover the loss he has sustained in consequence of the fraud practiced upon him. And this remedy he may resort to at any time allowed by the statute of limitations. The sale of the horse presents a familiar example. If the vendor has defrauded the purchaser upon such sale in knowingly misrepresenting the condition or equality of the horse, instead of repudiating the sale the latter may retain the horse and bring his action for the damages which he has sustained. These principles apply to executed contracts only. The cases of executory contracts are governed by different principles. In these cases, although the party has been fraudulently induced to enter into the contract, if, after a knowledge of the fraud that has been perpetrated against him, he goes on and performs the contract on his part he will be deemed to waive all objections which he might have made on account of such fraud. The law will presume that he is perfectly satisfied with the contract, notwithstanding he may have been deceived in some particulars. In such case, after having performed without objection, he can neither repudiate nor sustain an action for damages. For example, take again a contract for the sale of a horse to be paid for and delivered at a future time. If, after ascertaining that the vendor has fraudulently misrepresented the condition or qualities of the horse the purchaser shall accept the delivery of him, he would be bound to pay the stipulated price, and could sustain no action for damages. The law would be very defective if it were otherwise. The purchaser had it in his power, by refusing to accept the horse, to protect himself amply against any loss. By going on and executing the contract, therefore, he would be deemed to be satisfied with the horse at the price, notwithstanding the de-

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facts which were unknown to him at the time of entering into the contract.

Returning to the case under consideration, and assuming that by failing to give notice of the resolutions of February 1st until April, the bank lost the right of repudiating the transaction *in toto*, did it lose all remedy for the loss it sustained from the fraudulent conduct of the defendants? The complaint is broad enough to cover a claim for damages, and in fact that is obviously the scope of the action. Unless, therefore, this is one of those executory transactions or contracts above referred to, the right of action cannot be affected by any imputed laches on the part of the bank. Neither the unjust steward nor the fraudulent conspirator, if this was an executed contract, can insist that his victim shall act instantly, or forfeit for ever all remedy against him. The law has no such tender regard for the rights and interests of the bold offenders whose frauds and defalcations have of late so frequently startled and shocked the moral sense of the community. The statute of limitations in process of time will come to the aid of the worst offenders, as against a civil action, but that is not invoked in this case.

Was this then an executed contract within the principles laid down? It seems to me to be manifestly so. The sale of the stock was complete; the discount of that nondescript instrument was complete, and the pocketing of the exorbitant price for the stock by the senior Carver was complete. In fine, there was nothing more to be done to consummate the transaction as concocted between the parties. When it came to the knowledge of the other officers of the bank, the thing was accomplished. Carver had received his \$17,250, the bank had the stock upon its hands, and Prescott, who had been from the beginning the mere instrument for working these nefarious purposes, had performed his mission and was left as he began, with neither liability nor responsibility resting upon him. There was therefore nothing to be done, so far as the guilty actors were concerned, for perfecting the entire object of the conspiracy.

 Abbe v. Clark.

It is true the entire loss which the bank was to suffer had not been ascertained. The time for the payment of the instrument was executory, but that would not alter the rights of the parties, or make the transaction executory. If a note be given on the sale of a horse, payable at a future day, that does not render the contract of sale executory. The purchaser, if defrauded, might undoubtedly sustain an action, even before the note should become due. Or, to take a case more directly in point: suppose a note should be discounted by a bank upon a fraudulent representation as to the responsibility of the parties to it. Upon discovering the fraud, the bank would undoubtedly have its election to repudiate the transaction at once, and bring an action against the wrongdoer for the money advanced; or it might wait until the note became due, make an effort to collect it, and then bring an action for the fraud, alleging as damages the amount unpaid.

Upon the whole, I think the nonsuit was improperly granted, and the judgment should be reversed and a new trial granted

[OSWEGO GENERAL TERM, July 7, 1857. *Hubbard, Pratt, Bacon and W. F. Allen, Justices.*]

 ABBE vs. CLARK.

The code does not give to a defendant the right to object to the nonjoinder of a party, unless he pleads or gives notice of the defect.

If no notice of the defect is given, the objection is not available, except upon the question of damages.

Where two partners have a right of action against a third person, for a tort, and one of them assigns his right and interest in the claim to the other, who sues thereon, in his own name, if the defendant omits to set up the nonjoinder of the other partner, in his answer, or to give notice of the defect, he cannot insist upon the nonjoinder as a defense, upon the trial.

And assuming that such an assignment is invalid, and that the right of action remains in both partners, yet it is not a case for apportioning the damages; but the plaintiff is entitled to recover the entire sum awarded.

Abbe v. Clark.

THIS was an appeal from a judgment of the Oneida county court, reversing the judgment of a justice of the peace. Abbe, the plaintiff, and one J. R. Dunning, who were partners in, or joint owners of, a horse, exchanged horses with the defendant, in October, 1853; in which exchange it was alleged that Abbe & Dunning were defrauded by the defendant. On the 13th of February, 1855, Dunning sold and assigned his right and interest in the claim or right of action against the defendant for the fraud. The plaintiff, Abbe, thereupon brought an action before a justice of the peace, for the fraud, in his own name; setting forth the assignment from Dunning, in his complaint, and demanding judgment for \$100. The defendant put in a general answer, denying the allegations of the complaint. The answer was not accompanied by any notice of special matter constituting a defense. The plaintiff recovered a judgment for \$100, besides costs. This judgment was reversed by the county court; and the plaintiff appealed to this court.

Pomeroy & Southworth, for the appellant.

J. T. Spriggs, for the respondent.

By the Court, PRATT, J. Within the case of *Zabriskie v. Smith*, (3 Kern. 322,) the county court erred in reversing the judgment of the justice. That case is on all fours with this, and unless a different rule of pleading is to apply to justices' courts from that applicable to courts of record, it disposes of the question.

It is insisted that section 144 (of the code) does not apply to pleadings in justices' courts, but that does not necessarily aid the respondent. No part of the code gives the defendant the right to object to the nonjoinder of a party, without pleading or giving notice of it. By the rule in the code applicable to pleadings in justices' courts, (§ 74, *subd.* 4,) the answer may contain a denial of the complaint, or of any part thereof, and also a notice, in a plain and direct manner,

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of any facts constituting a defense. In this case no notice of this defect was given. It was therefore not available, except upon the question of damages. At common law, in actions in form *ex delicto*, if a party who ought to be joined as plaintiff was omitted, the objection could only be taken by plea in abatement or by way of apportionment of damages on the trial. The defendant could not, under the plea of the general issue, give evidence of the nonjoinder of a party plaintiff as a ground of nonsuit on the trial; nor could he demur or move in arrest of judgment for that cause, although the defect appeared on the face of the record. (1 *Chit. Pl.* 76. 1 *John.* 471. 6 *id.* 108.)

It is a question whether a plea in abatement is not abrogated by the code, but there is no difficulty in giving notice of it as a defense. And if that cannot be done, the damages might, in a proper case, be apportioned on the trial. There is no rule, either under the code or at common law, which will allow the evidence to be given as a bar without answer or notice setting it up.

The remaining question is whether damages should have been apportioned. In the case of *Zabriskie v. Smith* the action was for deceit, and there had been in that case, as in this, an attempt by one partner to assign the demand of his copartner. Judge Denio held that there was a distinction in such cases from the ordinary case of tenants in common. In the latter case the interest is not joint, and therefore the recovery by one would not bar a right of action or recovery by the other. The case of partners he held to be different. They had more of the character of joint tenants, and assuming that the assignment was void, the right of action would be joint and the damages when recovered go into the common stock, and would necessarily enure to the joint benefit of both. Hence the court in that case held that the damages need not be apportioned, and that a recovery by one, of the entire damage, was right.

Whether the peculiarity of the relation between partners

Burton v. Baker.

should not affect the validity of an assignment of one to his copartner of his interest in a joint right of action for a tort, it is not necessary to inquire. In the case of tenants in common, it requires an assignment or sale to pass the undivided interest of one to the other. But in the case of joint tenants, that is not necessary. A release from one to the other would be sufficient. But it is enough in this case that the defendant, not having in any manner set up the nonjoinder in his pleading, could not insist upon it as a defense, upon the trial. And assuming that the assignment was invalid, and that the right of action remained in the two living partners, it was not a case for apportioning the damages, and the plaintiff was entitled to recover the entire sum. Whether the defendant knew of the defect in the property was a question of fact, and as there was some evidence charging him with such notice, the verdict of the jury is conclusive.

The judgment of the county court reversed and that of the justice affirmed.

[OSWEGO GENERAL TERM, July 7, 1857, *Hubbard, Pratt, Bacon and W. F. Allen, Justices.*]

WILLIAM BURTON vs. HIRAM N. BAKER.

B. made a note for \$500, payable to G. or bearer. The note was made without consideration, for the accommodation of G. and to enable him to raise money, and was delivered by G. to the defendant, to be used to raise money for G. The note was afterwards signed by G. also, without the knowledge or consent of B. The defendant then indorsed upon the back of the note, a guaranty of the payment thereof, and sold the note to Burton, the plaintiff's assignor, for \$425. *Held* that if the note was a valid note in the hands of G., as against B. when originally delivered to G., the transaction was not usurious, and the defendant was liable upon the guaranty, although G. signed the note without the knowledge or consent of B. at the same time the guaranty was signed, and the money advanced to G. by Burton.

The plaintiff was accordingly adjudged to be entitled to recover of the defendant, upon his guaranty, the amount actually advanced by Burton, upon the purchase of the note, with interest.

Burton v. Baker.

MOTION for a new trial, upon a bill of exceptions. The complaint contained four causes of action. The first stated that one David Babcock, on the 9th of February, 1855, made, executed and delivered to Hawley J. Goodwin, his note, of which the following is a copy :

" Utica, Feb. 9, 1855.

\$500. One year from date, I promise to pay Hawley J. Goodwin, or bearer, five hundred dollars, with interest, value received, payable at the Bank of Utica.

DAVID BABCOCK."

That afterwards, and on the 15th of February, 1855, in consideration that one David Burton would purchase the note of the defendant, who was the owner and holder thereof, and pay therefor \$425, the defendant guarantied the payment of the note as follows :

"For value received, I guaranty the payment of within this note.

H. N. BAKER."

That the defendant delivered the note and guaranty to said David Burton, who paid the defendant therefor \$425. The second count was for \$425, money had and received by the defendant, of and to the use of David Burton. The third count alleged that on the 15th of February, 1855, the defendant was the holder of the note described in the first cause of action ; that he assigned the note to David Burton, who paid him therefor \$425 ; that said David supposed the note to be valid, whereas Babcock, the maker, had executed and delivered it to Hawley J. Goodwin, as an accommodation note, and for the purpose of raising money, and Goodwin had delivered it to the defendant for the use of him, Goodwin, and to enable the defendant to raise money thereon for him, Goodwin ; all of which was unknown to Burton. By reason whereof the note became and was worthless ; that the note had been tendered to the defendant, and the money advanced demanded. The fourth cause of action alleged that on the 15th of February, 1855, the defendant was the holder of the note above described, and that in consideration that David Burton would

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and did purchase the note from the defendant, and pay him therefor \$425, the defendant agreed to guaranty its payment, and that it was made on a good consideration as between Babcock and Goodwin, and was valid, and that the defendant had good title thereto; that the note had theretofore had a legal inception, and would be collectible for its full amount in the hands of Burton; whereas, in truth and in fact, the note was made by Babcock, without consideration, for the accommodation of Goodwin, and to enable him to raise money, and was delivered by the latter to the defendant to be used to raise money for Goodwin; by means whereof the note became and was worthless. An assignment of these causes of action from David Burton to the plaintiff was alleged. The answer contained five separate defenses. The first was a denial of the complaint. The second, third and fourth stated that the note had no legal inception until it was discounted by David Burton, and that it was signed by Goodwin and guarantied by the defendant on a usurious agreement. The fifth answer alleged that the note was made by Babcock as his individual note; and that afterwards, without his knowledge or consent, it was changed in a material part, to wit, by being signed by Goodwin, and being made the joint and several note of Babcock and Goodwin. The action was tried in December, 1856, at the Herkimer circuit. The plaintiff read in evidence a note in the terms above set out, signed by Babcock and H. J. Goodwin; on the back of which was a guaranty of payment, signed by the defendant. He then proved the interest on \$425 from February, 1855, to be \$24.76, and rested. The counsel for the defendant moved the court to nonsuit the plaintiff on these grounds: 1. That the proof did not establish the cause of action stated in the complaint. That the proof established an entirely different cause of action from that stated in the complaint. That the note proved was an entirely different one from that mentioned in the complaint. 2. That the signing of this note by Goodwin after it was made and issued by Babcock, without the knowledge or consent of the latter, destroyed

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Babcock's liability and made it the sole note of Goodwin. 3. That on the facts stated in the complaint and the proofs, the note and guaranty was usurious. 4. That on the complaint and proofs the defendant was not liable. The motion was denied, and the counsel for the defendant excepted. The defendant then introduced testimony to sustain the defenses set up in his answer. At the close of the testimony his counsel insisted, and asked the court to rule and decide, that the plaintiff was not entitled to recover, and that the complaint should be dismissed, or a verdict ordered in favor of the defendant, on the following grounds: 1. That the transaction was usurious, because in legal effect it was a loan of \$425 to Goodwin, upon and for his note for \$500 and interest guaranteed by the defendant; that assuming that the note, as made by Babcock, was completely issued when signed by him and delivered to Goodwin, the signing of it by the latter, without the knowledge or consent of Babcock, discharged him, and made it the individual note of Goodwin. 2. That if Goodwin was authorized by Babcock to sign the note as a maker, then it was not a complete and valid note in the hands of Goodwin until so signed, and had no legal inception until it was signed by Goodwin, and the transaction with and transfer of it to Burton was usurious. 3. That the promise made by Goodwin as a signer of the note, and which was guaranteed by the defendant, was usurious, and that the plaintiff could not recover, whether the note was originally a valid note in the hands of Goodwin or not. 4. That upon the complaint and evidence, the note and guaranty in the hands of David Burton were and each was usurious. 5. That upon the case made by the pleadings and evidence, the plaintiff was not entitled to recover. 6. That even if the note was a valid note, in the hands of Goodwin, as against Babcock, the transaction with Burton was usurious as against Goodwin and the defendant. 7. That upon the pleadings and evidence, the note was not a valid note in the hands of Goodwin, as against Babcock, and that this was not a case to be submitted to the jury on this

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question. 8. That upon the case made, the defendant was entitled to have the complaint dismissed, or a verdict ordered in his favor. The court overruled these requests and objections of the defendant's counsel, and refused to dismiss the complaint or order a verdict in favor of the defendant. The court charged the jury, among other things, that if the note in suit was made by Babcock, and delivered by him in good faith to Goodwin, even in exchange for his note with the indorsements on it, it would be a valid note in his hands, and the sale of it by him for less than par would not render it usurious. To which ruling and charge the defendant's counsel excepted. That if the note was delivered to Goodwin to enable him to raise money upon it, with the understanding that he was to take care of it, and the other note was delivered to Babcock, not absolutely in exchange, but as a security against a failure to take care of it, it would not in that case be a valid note in the hands of Goodwin, and a sale of it by him at a discount of over seven per cent would render it usurious and void. That if the note was valid in the hands of Goodwin, as against Babcock, and he sold the same to Burton absolutely, it would not be rendered usurious as to the defendant, although it was signed by Goodwin, and guarantied by the defendant at the time of the sale, and as a condition of such sale. To which ruling and charge the defendant's counsel excepted. But that if the design of Burton was to loan the money to Goodwin, although the payment was to be secured by the note of Babcock and himself guarantied by Baker, it would be usurious, although the note might have been valid in the hands of Goodwin, as against Babcock. The court further ruled and decided that if the note in suit was a valid note in the hands of Goodwin, as against Babcock, when originally delivered to the former, then the transaction was not usurious, and the defendant was liable upon the guaranty, although Goodwin signed the note without the knowledge or consent of Babcock, at the same time the guaranty was signed, and the money advanced to Goodwin by Burton. To this ruling and decision the coun-

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agreement by Goodwin, not merely to repay him this sum and legal interest, but to pay him, for and in consideration of the advance, \$500, and over seven per cent per annum on this latter sum, at the expiration of eleven months. This certainly is an agreement by which Goodwin expressly contracts to pay more than legal interest for the forbearance of money advanced to him, and is directly contrary to the statute to prohibit usury. (3.) The defendant guarantied the performance by Goodwin of his promise, i. e. to pay \$500 and legal interest thereon, in consideration of the advance of \$425, and giving day of payment therefor during eleven months. (4.) The contract or agreement made by Goodwin and by the defendants was in writing, and was express. The one as principal, and the other as surety, expressly agreed that, for the advance and forbearance of a sum of money, Goodwin would repay to David Burton the same, with more than legal interest. Where both the terms and legal effect of an agreement render it usurious, the court cannot give it any other effect, or hold that the parties intended any other result. (5.) Conceding, therefore, that the original note or promise made by Babcock is valid, and can still be enforced by the plaintiff against him, the promise by Goodwin, and the contemporaneous guaranty by the defendant of its fulfillment, are usurious and void. (*Johnson v. Morley*, *Lalor's Sup.* 29.)

V. The transaction cannot be held valid as against Goodwin or the defendant on the ground that it was the sale of a chattel, and not a loan of money. (1.) The cases in which it has been held that where the holder of a valid note sells it for less than its face, and indorses it, the transaction is not, *per se*, usury, proceed upon the ground that in form the transaction is the sale of a valid obligation, and there is no agreement by the party receiving the money to repay more than the sum advanced, and legal interest thereon. (*Cram v. Hendricks*, 7 *Wend.* 569, 614, 641-5. *Mazusan v. Mead*, 21 *id.* 285. *Anderson v. Rapelye*, 9 *Paige*, 483; *S. C.* 4 *Hill*, 472 to 486.) (2.) It will hardly be claimed, in view of the

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discussion in these cases, and the close votes by which they were decided, that they would have been held free from usury if the facts had been like those in this case. (3.) In the case at bar the transaction is not in form the sale of a note indorsed or guarantied by the party receiving the money. (4.) He became and was, if not the sole, clearly a joint original maker of the note discounted. (5.) The transaction was not in substance the sale of a note. The party receiving the \$425 advance became and was a maker of the note on which it was advanced. He expressly, in terms, agreed, in consideration of the advance, to repay \$500 and interest thereon. There was no note or obligation transferred to Burton except the note of which Goodwin was a maker. (6.) The court must construe the contract of Goodwin according to its clearly expressed terms. It is impossible to say that he agreed only to pay \$425 and interest. Can it be said that on this instrument the plaintiff can recover of Babcock \$500 and interest, and of Goodwin only \$425 and interest? This would be making a contract for the parties, in direct contradiction of the written terms made by them. Unless the court can do this, the transaction as to Goodwin and the defendant is plainly usurious.

VI. The court, therefore, erred in overruling the several propositions submitted by the defendant's counsel, and in refusing to dismiss the complaint, or order a verdict for the defendant.

VII. The court erred in the charge to the jury. The first proposition of the charge was erroneous. The pleadings and evidence did not present the question of whether there was a sale of a note or not. The evidence showed the money was not advanced upon a sale and purchase of a note, but upon an original contract by Goodwin to repay \$500 and interest thereon. (11 *Paige*, 660.) The other propositions are also erroneous. Neither within the usury law, nor in any other sense, can a party be said to *sell* a note of which he is a maker. It has no value or validity, as to him, until he transfers it.

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Unless we are wrong in all the points above submitted, there is error in the last clause of the charge.

VIII. The transaction as to Goodwin and the defendant is usurious, and the verdict should be set aside, and a new trial ordered.

M. H. Throop, for the plaintiff. I. No question arises here upon the verdict of the jury, or the weight, effect or sufficiency of the proof. This is a naked bill of exceptions, and the only question is whether the judge made any erroneous ruling in the progress of the trial.

II. The motion for a nonsuit was properly disposed of. The proof sustains the first count. The variation was immaterial — no proof was offered that the defendant had been misled. There was no testimony showing the note to be usurious, and all the allegations of the complaint being denied by the answer, there was nothing in the record showing it to be so. If the allegation of usury had been admitted of record, the result would have been the same, for the plaintiff sought to recover upon his first count only.

III. No exception arises to the denial of the motion for a nonsuit made at the close of the case. The legal positions taken by the defendant's counsel depended upon facts then yet to be ascertained by the verdict of the jury; except where they are comprised in the exceptions to the charge, and are discussed under the next point. Even if they had all been correct, no exception would lie; for the plaintiff having once proved a *prima facie* case, and rested, and the defense depending upon affirmative evidence, the court properly submitted the whole case to the jury. It is in all cases discretionary with the court to do so; and if the defendant has proved a defense, his remedy is not to be sought by exception.

IV. The charge was unexceptionable. The first exception will not, we presume, be insisted on. (3 *Wend.* 62. 13 *Barb.* 45.) The second and third exceptions are taken to two clauses of the charge, which properly belong together, and

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will be considered together. The question whether the transaction was a sale of the note by Goodwin to Burton, or a loan of money from Burton to Goodwin, was fairly and fully submitted to the jury, who have found by their verdict that it was a sale. Assuming it to be a sale, the question is, whether upon a sale, at a discount, of a note valid in the holder's hands, the subscribing of the note by the holder, "without the knowledge or consent" of the maker, as a consideration of the sale, and part of the transaction, renders the transaction usurious, and avoids the simultaneous guaranty of the note. (1.) It is manifest that the first step of the defendant, to make out his side of the argument, must be to show that his principals (if Goodwin is, as to Baker, a principal) are, or that one of them is not liable. It is also manifest that unless Babcock was discharged by Goodwin's signing the note, Goodwin was a mere surety for Babcock; or to consider it in another aspect, the note, being several, was in effect two separate notes, one made by Goodwin, and one made by Babcock, Goodwin's note being held as security for the payment of Babcock's, and Baker being a guarantor of each. Goodwin's note, though in form for the full amount, was liable to be reduced to the amount of the advance, and upon neither note could Baker be made liable for more than the advance. All these principles are laid down in *Cobb v. Titus*, (13 Barb. 45,) affirmed in court of appeals. (See *Selden's Notes for April Term, 1854*.) The defendant cannot therefore avoid his liability if Babcock continued liable after Goodwin signed. Now we contend, as our first proposition, that the note became, by the signature of Goodwin, the *several* and not the *joint and several* note of Goodwin and Babcock, and the alteration did not discharge or affect Babcock's liability upon it. It has been held, since the earliest times, that any alteration of a contract after its execution, discharged the contracting party, who did not assent to it, provided it affected in any respect his contract or undertaking, but not otherwise. Formerly it was said that it must affect it to his prejudice; but that qualification need

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not be insisted on here. Thus if a note for \$500 is altered to \$250, the maker not assenting, it may be conceded that he is discharged, because such was not his contract; but if his contract remains unaffected, the alteration is immaterial. (*Chitty on Bills*, 184. *Marson v. Pettit*, 1 *Camp.* 82, n. *Atwood v. Griffin*, 2 *Car. & P.* 368. 12 *U. S. Dig.* 33, § 7. 15 *id.* 33, §§ 11, 12. *Bruce v. Westcott*, 3 *Barb. S. C. R.* 374.) Although the signing the note by Goodwin made it *prima facie*, as between the makers and the holder, their joint and several note, (*Story on Prom. Notes*, § 57,) yet inasmuch as their liability to the holder was different, Babcock being liable for the full amount, and Goodwin for only \$425 and interest, it follows that it was in fact their several note. (*Cobb v. Titus*, 13 *Barb.* 45.) If so, there is an end of the argument, for clearly a person who becomes severally liable with another, does not thereby in the least alter or affect the contract of the other party. This is admitted by counsel on both sides, and by the court, in the case in 32d *Eng. Law and Eq.*, cited *post.* But treating it as a joint and several note, it is equally difficult to see how Babcock's liability was affected. His contract was to pay the whole note at maturity, and in addition to reimburse any person who might be compelled to pay it by becoming surety or indorser upon it; and it is difficult to see how the creation by another person of a joint liability with him, which was however, as between him and such person, a new contract of suretiship, affects in any respect his contract. This principle was supposed to be settled in England by the case of *Catton v. Simpson*, 8 *Adol. & Ellis*, 136, (35 *Eng. Com. Law Rep.* 355,) reported also in 3 *Nev. & P.* 248, 1 *W. W. & H.* 157, and 2 *Jur.* 888, cited also *Chitty on Bills*, 188. But the recent case of *Gardner v. Walsh* (32 *Eng. Law and Eq. Rep.* 162) is considered as overruling this case. It distinctly recognizes the doctrine, that if the note was several, the addition of a name does not affect the contract, but in the case of a note which had been executed by a principal and one surety, the addition

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of another joint and several surety, without the consent of the first, was held to discharge the first surety. There is this broad distinction between this case and *Gardner v. Walsh*, viz. that there the question arose between two sureties for one principal, and here it is only the common case of one man who is surety for another. Adding the word "surety" after Goodwin's name would neither have increased nor diminished his liability, or altered his rights as respects the holder, or Babcock, (*Berg v. Radcliff*, 6 *John. Ch.* 303;) as to the holder, he is a joint and several maker, but as to Babcock, he is in judgment of law a surety within the ruling in *Cobb v. Titus*, and all the principles applicable to the relation. Unless the ruling in *Gardner v. Walsh* depended upon some peculiarity of the English practice, or some principle of law in relation to joint debtors in which their courts and ours differ, it must have rested upon the notion that the addition might affect the remedy for contribution between the sureties, or the surety's right to recover against his principal. It could not have been, (at least as applied to the rule of law here,) because it subjected him to being joined in an action with another as defendant; for if that was the test, an indorsement would vitiate the note. In this case Babcock's liability and Babcock's contract were not changed—his original contract and his original liability were to pay the holder absolutely, or to refund to Goodwin if Goodwin was compelled to pay. He contemplated that Goodwin should make himself liable upon it. The rule in *Gardner v. Walsh* never has been, and never will be, followed in this country. A succession of names on notes, put there at different times, is one of the commonest things to meet with, and to hold that none of the signers except the last one are liable, would shock the sense of the whole business community. (*See Warner v. Price*, 3 *Wend.* 397; *Harris v. Warner*, 13 *id.* 400.) However open the question may have been in England, it is no longer open for argument in this state. *Norton v. Coons* (3 *Denio*, 130) is a direct authority sustaining *Catton v. Simpson*, and though the facts

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are slightly varied, it cannot be distinguished from it on principle. The doctrine of *Gardner v. Walsh* is also irreconcilable with the case of *Cobb v. Titus*, (13 Barb. 45,) affirmed in the court of appeals. Any argument which reconciles *Cobb v. Titus*, and *Gardner v. Walsh*, will also reconcile the latter with the judge's charge in this case. Such also was assumed to be the law in 3 Wend. 397, and 13 Wend. 400; and although the precise point was not taken in these cases, yet the courts, and the profession, having acted upon the assumption that such was the law, and it being impossible to hold the contrary without overturning these cases and those in 13 Barb. and 3 Denio, the question is no longer open. (*Richards v. Edick*, 17 Barb. 264, 265.) (2.) But assuming that the legal effect of Goodwin's signing the note was to discharge Babcock, the note is not rendered thereby usurious. Two things must concur to make usury. (a.) There must be an intent to take unlawful interest, and the law in usury cases pays no attention to the form of the contract, but only looks at the intent of the parties. (*Chitty on Cont.* 604. *Nourse v. Prime*, 7 John. Ch. 69. 10 U. S. Dig. 425, § 13.) (b.) There must be a loan. (*Dry Dock Bank v. Am. Life Ins. and Trust Co.*, 3 Comst. 344. 4 Hill, 224.) The absence of either of these requisites avoids the claim of usury. Now in this case the jury have found that neither of them exists. Babcock's note was not thereby absolutely avoided, for, if it had been, the debt would have been discharged also, whereas it is well settled that an altered note will support an action for the consideration. (*Gould v. Combs*, 1 M., G. & S. (50 Eng. Com. Law) 543; S. C. 14 Law J., N. S., 175. 9 Jur. 494.) It was therefore voidable merely, at Babcock's election, and Baker's contract (and indeed Goodwin's also) did not differ from the common case of a man guaranteeing an infant's contract. The guaranty was that Babcock should not exercise his election to avoid the contract. There can be no doubt that a subsequent assent to, and recognition

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of, the alteration by Babcock, would make him liable without any new consideration or any new contract.

By the Court, PRATT, J. If the question in this case was an open one, I should have no difficulty in arriving at the conclusion that the transaction was tainted with usury.

The leading case of *Cram v. Hendricks* (7 Wend. 569) was based upon assumed principles that I never was able to comprehend. If the court had held, simply, that the sale of a valid pre-existing note or bill, although indorsed or guarantied by the seller, was not essentially a loan of money to him, but rather the sale of a chattel and therefore not usurious, the proposition would at least have been intelligible. But the court went further, and held that the indorsement or guaranty was not the undertaking it purported to be, but was simply a guaranty for the repayment of the amount received.

There have always appeared to me to be at least two palpable difficulties in regard to this decision. In the first place, if the transaction was the simple sale and transfer of a chattel, it is difficult to see upon what legal principles a guaranty of the payment or collection of it should not be treated the same as the warranty of the goodness or quality of any other chattel, and the party contracting held to respond in damages to the entire extent of his contract. The man who upon the sale of a horse warrants him to be good and sound, is, upon default, liable to respond in damages to the amount of the difference between the value of the horse as he actually was and as the vendor contracted him to be. The damages would not be affected at all by the price received for him upon the sale. But in the second place, if it be assumed that it is not an absolute sale of a chattel when the personal responsibility of the vendor is required, but that to the extent of the money received he is a borrower, and simply agrees, so far as he undertakes personally, to repay the amount received with legal interest, then, within every principle of law applicable to the statutes of usury, the transaction would be usurious. It would

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be an absolute undertaking on the part of the borrower, that the lender should at all events be repaid his money with legal interest, with the chance of receiving an additional sum depending on the responsibility of the maker of the transferred note. The lender would therefore be receiving for the use of his money more than the legal rate of interest. But the error in that case, if there be any, must be deemed in this state ineradicable except through the action of the legislature. The case at bar is different from that of *Oram v. Hendricks*, and pushes the doctrine upon which the decision in that case was based to a still farther extreme. In this case there is not an indefinite indorsement or guaranty, but a specific undertaking to pay the whole amount, in so many words. As a case, therefore, unaffected by the decision in that and subsequent cases, I should have no difficulty in holding the rulings at the circuit erroneous.

1st. If the signing of the note by Goodwin, as maker with Wilcox, was without the consent of the latter, he would be discharged. It would be an alteration of it in its legal effect. (11 *Coke*, 27. 4 *Cranch*, 60. 9 *id.* 28. 32 *Eng. L. and Eq.* 162.) The note therefore, so far as it had any validity at the time of the guaranty and transfer to the plaintiff, was simply the note of Goodwin alone. As Goodwin received the money he must be deemed the borrower, and the transaction was usurious within all the cases.

2d. Assuming that Wilcox was not discharged, the note, as a joint and several undertaking, was not completed, and therefore did not have its inception until it was signed by Goodwin and transferred to the plaintiff. It was long ago held by Holt, Ch. J. that when a party signed a note as security, with the assent of the maker, after it was executed and delivered, it became a new contract, and required a new stamp, under the stamp act. (*Holt's N. P.* 474.) It was guarantied as a joint and several note, and no other. The claim that it might be treated as a several note is, at all events, as against the defendant, untenable. Upon this note, thus signed at the time,

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one of the joint and several makers received, at the time of its inception, as a complete and valid instrument for the payment of \$500, the sum of \$425 only. It seems to me that it was as plainly a loan of that amount to Goodwin, as if the name of Wilcox had not been on the note.

3d. But assuming that the undertaking of Goodwin was several and not joint, then it must be deemed equivalent to a new note for \$500. Suppose Goodwin had in fact, at the time of receiving the \$425, given his note for \$500, at one year, guarantied by the defendant, and at the same time transferred the note signed by Wilcox, could there be any doubt that Goodwin's note would be void for usury? It would be in legal effect a loan of the amount, to him, with a direct, specific undertaking to repay the amount and \$75 as a usurious premium for the forbearance. In this aspect of the case it differs from that of *Cram v. Hendricks*, in its being, instead of a general indorsement of a valid pre-existing note, a direct undertaking to repay the whole amount, including the usurious premium. And the guaranty being collateral, this undertaking of course is invalid if the note itself is.

Examining the case, therefore, as a new one, and applying to it legal principles as old as the English statutes of usury, I would have no hesitation in holding the transaction usurious. But the case of *Cobb v. Peters*, (13 Barb. 45,) decided in this court and afterwards affirmed in the court of appeals, is directly in point to sustain the ruling at the circuit. The only difference is, that the action in that case was against the makers, and both were held liable, the last signer for the amount he actually received. But if an action can in this case be sustained against Goodwin, it will not be claimed that it cannot be sustained against the defendant. The case therefore is directly in point; and although it does not appear that any point was taken, in that case, that the first signer was discharged by the second party signing, yet the point was clearly in the case, and the decision could not have been made except upon the assumption that he was not discharged.

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If an important consideration has been overlooked in the court of appeals, I think we should leave it to that court to correct the error. We should not assume that that court did overlook the point, but rather that all the points in the case, necessary to the decision, received the careful consideration of the court.

Motion for a new trial denied, with costs.

[OSWEGO GENERAL TERM, July 7, 1857. *Hubbard, Pratt, Bacon and W. F. Allen*, Justices.

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THE BLACK RIVER AND UTICA RAIL ROAD COMPANY
vs. BARNARD.

When the proceedings for the organization of a rail road corporation are regular upon their face, and the company, while in the actual exercise of all its corporate functions, is recognized by the legislature as a corporation, it becomes, by such recognition, *ipso facto*, a legal corporation.

Any defect, or irregularity, in the proceedings required by law to be taken for its organization, should be deemed to be waived by such recognition.

The power which prescribes the formalities to be observed in order to create a corporation, is able to dispense with them.

Where the articles of association of a rail road corporation were in proper form, and properly authenticated and certified, and so far as such articles were concerned, all the requirements of the statute had been complied with; and the company had assumed corporate functions, built a portion of its road and gone into actual operation, and had been doing business some five years; the defendant being one of the directors and acting as such for several months; and the legislature had, by three several acts, distinctly recognized its corporate existence; *Held*, in an action by the corporation to recover calls upon its capital stock, that it was to be deemed a legal corporation, and authorized to sue, as such.

APPEAL from a judgment entered upon the report of a referee. The action was brought to recover \$1000 and interest, being the balance of a subscription of \$2000, alleged to have been made by the defendant to the capital stock of the plaintiffs' company. The referee reported in favor of the plain-

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tiffs for the balance claimed to be due, and the defendant appealed.

Ward Hunt, for the appellant,

E. A. Graham, for the plaintiffs.

By the Court, PRATT, J. The only point made upon the trial of this cause was, that the company was not duly organized as a corporation. It was not claimed that the subscription of the defendant was void for want of consideration, or for any reasons of public policy, but it was simply claimed that all the requirements of the statute, necessary to the due organization of the company as a rail road corporation, had not been observed. The exceptions taken were to the ruling of the referee excluding testimony offered for the purpose of showing that all the statutory requirements had not been complied with. Substantially the same ground was taken by the counsel for the appellant upon the argument of this appeal. This, then, as I understand the case, is the only question before us for our consideration; for had the position been taken upon the trial that the subscription itself was void for any reason, we cannot say that the ruling would not have been different. Our consideration, therefore, it seems, should be confined to the legal proposition raised upon the trial, and should not be extended to any other.

The simple question then is, were the plaintiffs, at the time of the several calls for which this action is brought, and are they now, a valid legal corporate body?

The articles of association were in proper form, and properly authenticated and certified. So far as the articles themselves are concerned, all the requirements of the statute have been complied with. The company also assumed corporate functions and went into actual operation, and had been in operation some five years, when this suit was commenced, the defendant himself being one of the first directors and acting as such for several

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months, and the company is now in actual operation. The law-making power of the state, by three several acts, have distinctly recognized its corporate existence. (*See Session Laws 1853, ch. 278; 1854, ch. 12; 1856, ch. 117.*)

Now I am not prepared to say that there may not be such actual defects or frauds in the organization of a rail road company, not appearing in the articles of association, that its legal existence may be questioned collaterally; that because articles of association, purporting to be regular upon their face, are filed, therefore a corporation *de facto* springs into existence, which can only be annulled by direct proceedings in the nature of a quo warranto. But when the proceedings are regular upon their face, and the company, while in the actual exercise of all its corporate functions, is recognized by the law-making power of the state as a corporation, it becomes by such recognition, *ipso facto*, a legal corporation. (9 *Wend.* 380. 3 *Comst.* 470.) Any defect or irregularity in the proceedings required by law to be taken for its organization, should be deemed to be waived by such recognition.

Clearly the power which prescribes the formalities to be observed in order to create a corporation, is able to dispense with them. The judgment must therefore be affirmed.

[ONONDAGA GENERAL TERM, JANUARY 4, 1859. *Pratt, Bacon, W. F. Allen and Mullin, Justices.*]

GREEN, adm'r, &c. vs. THE HUDSON RIVER RAIL ROAD COMPANY.

An action can be maintained, under the act of 1847, "requiring compensation for causing death by wrongful act, neglect or default," by an individual as administrator of his deceased wife, whose death was caused by the negligence of the defendant, on a complaint alleging that the deceased left a mother, who was her next of kin, surviving her.

A PPEAL from a judgment rendered at a special term, overruling a demurrer to the complaint. The action was

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brought by the plaintiff, as administrator of his deceased wife, Eliza Green, under the act of 1847, (*Laws of 1847, p. 575*), to recover damages of the defendants for causing the death of his said wife, by their wrongful act, neglect or default. The defendants demurred, on the grounds that the plaintiff had not legal capacity to sue; that several causes of action had been improperly joined, and were not separately stated; that the complaint did not state facts sufficient to constitute a cause of action, &c. The following opinion, delivered by the justice, at special term, states the points more fully.

"BACON, J. This action is brought by the plaintiff, as administrator of his deceased wife, to recover damages for the loss of her life, which occurred instantaneously, by a collision of the cars on the defendants' road, she being a passenger therein at the time. The action is instituted under the statute of this state requiring compensation for causing the death of any person by wrongful act, neglect or default. The complaint sets forth the facts of the case, averring the negligence and the death caused thereby, and then alleges that Margaret Ford, the mother of the deceased, and her next of kin, suffered loss and damage thereby, and avers specially that she was aged and infirm, and dependent upon the deceased for her support, which support was rendered by the deceased; and that by the shock and the mental distress ensuing, her health has been impaired, and she has become incapable of maintaining herself. To this complaint the defendant has interposed a demurrer, which (omitting some special grounds to the form of the complaint) presents the general question whether sufficient facts are stated to constitute a cause of action. I shall assume that at common law no right of action whatever exists or can be maintained by any person, under the circumstances of this case. It is only by virtue of the statute, which was intended to remedy this defect, and reverse the rule of the common law, that this suit can be maintained, and the question then is, is this a case coming within the terms and spirit of the act?

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As an original question, I confess my impressions would be strongly against the maintenance of this suit. The intent of the statute being to give a remedy where none existed before, it is obvious to remark, that its benefits can only be extended to those who are included within its terms. The first section gives a right of action wherever the party killed would have been entitled to bring a suit for the injury, if death had not ensued. The second section provides that the suit shall be brought in the name of the personal representative of the deceased person, and that the amount recovered shall be for the exclusive benefit of *the widow and next of kin* of the deceased, and the jury may give such damages, not exceeding \$5000, as they shall deem fair and just, with reference to the pecuniary injuries resulting from such death, to the widow and next of kin of such deceased person. The plain and literal interpretation of this statute would seem to require that the party killed must be one who could, in his or her own right and name, maintain a suit if death had not ensued, and also, that there must be both widow *and* next of kin surviving, in order to authorize a recovery, and that some *pecuniary* injury must be shown, to lay a foundation for damages.

All the cases, with the exception of a special term decision of Judge Harris, reported in 12 *Howard*, 323, and a case to which I shall refer hereafter, seem to take for granted the first part of this proposition, or at least they were cases where there could be no doubt on this point, because the party injured was a single person. The case of *Lynch v. Davis*, (12 *How.* 323,) above referred to, was an action brought under the statute by a husband, as administrator of his wife, for alleged malpractice, ensuing in her death. Judge Harris, among other things, held that the case was not within the statute, for the reason that the wife, if she had survived, could not have maintained the action, since the suit must either have been in favor of the husband alone, or the husband and wife as joint plaintiffs, and that the case was, therefore, not within the terms or intent of the statute.

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In regard to the other suggested interpretation of the statute, to wit, that there must be both widow and next of kin, among whom distribution can take place, in order to ground a right of recovery, several cases have arisen in which the conclusion has been reached that if there be either a widow or next of kin surviving, the action can be maintained. In the case of *Safford v. Drew*, (3 *Duer*, 627,) the plaintiff was the administrator of his son, who, it was alleged, had lost his life by the wrongful act of the agent of the defendant, and he described himself simply as the father of the deceased. On demurrer the court held the complaint defective, because it did not aver that the deceased left a widow or next of kin. The statute is minutely examined and commented on by Judge Hoffman, and he says the court are of opinion that the act may be so interpreted as to allow an action where there is a widow only, or next of kin only, as well as where both are in existence.

In the case of *Quin v. Moore*, (15 *N. Y. Rep.* 432,) the party who lost his life was a child of the age of 12 years, and the action was brought by the administrator for the benefit of the mother, who, it was admitted, was the sole heir and next of kin to the child. A recovery was had, and the judgment was sustained by the court of appeals. Judge Comstock, in giving the opinion, says, that the only condition on which the right of the administrator to sue under the statute depends, is the common law right of the injured person to maintain an action if he were living; and that it is not required that the person killed should be a husband, father or protector, although the legislature, in passing the act, were doubtless mainly influenced by the evident justice of compelling the wrongdoer to compensate families dependent, in a greater or less degree, for support, on the life of the deceased.

To the same effect is the case of *Oldfield v. Harlem R. R. Company*, (4 *Kernan*, 310,) in which case the court also held that no special pecuniary injury, arising from the death, need

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be averred or proved in order to enable the party to recover damages.

Lucas v. The New York Central Rail Road Co., (21 Barb. 245,) was an action brought by a husband in his own right and as administrator of his deceased wife, who was instantly killed while in the cars of the defendant's rail road. The complaint was demurred to, both on the ground of misjoinder of causes of action, and because there was no averment that the deceased left any next of kin. It was held defective on both grounds, and the court, Mr. Justice Welles giving the opinion, say, that if there is neither wife or next of kin, there can be no such pecuniary damages recovered as the act contemplates. They waived the other question as one not necessarily presented, to wit, whether an action would lie for the death of a wife under the statute, in any case.

At the Madison circuit, in March, 1857, the suit of Lorenzo Dickens, administrator of Sally Dickens, his wife, against the New York Central Rail Road Company, was brought to trial, and resulted in a verdict for the plaintiff. It was brought under the statute, and the complaint alleged that the deceased was instantly killed by being run over by the cars of the defendant, and that the plaintiff, as her husband, and others the next of kin of the deceased, suffered loss and damage thereby. It was admitted that the deceased left no children, nor father, nor mother, but two brothers and a sister surviving her. A motion for a new trial was made at a general term in the 6th district, and after argument the motion was denied, and the recovery sustained. I have been furnished with the opinion delivered by Judge Balcom, in which the other judges concurred, as is stated, on the ground that the decision in *Quin v. Moore* had settled the question that the plaintiff, as administrator of his wife, could sustain the action. In the opinion of Judge Balcom it is held, that if the plaintiff's wife had not died, the defendant would have been liable to an action for the damages occasioned by the injury. He does not notice the distinction taken by Judge Harris, that an action could

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not have been maintained by the wife if she had survived, but holds that, inasmuch as the defendant would have been liable to an action if the wife had survived, the condition of the statute is fulfilled, and the right of the administrator to sue is clear. He also holds that the action can be maintained by the personal representatives of the deceased, although such deceased person left no husband, or wife, or next of kin surviving, who could ever have any legal claim upon such person, if living, for services or support. This decision covers all and more than is claimed on the part of the plaintiff in this suit; for the averment here is that the deceased left a mother, her next of kin, who was dependent on the deceased for her support, and who, by reason of the death, has not only been deprived of this support, but has sustained other specific damages. I do not profess to be entirely satisfied with the law as laid down in this case, and I follow it with some hesitation; but highly respecting the source from which it comes, and yielding to it as a decision in a conterminous district, made at general term, I think I am bound by its authority.

The result is that there must be judgment for the plaintiff on the demurrer, with leave to the defendant to answer on payment of costs.'

T. M. North, for the appellants.

Morris S. Miller, for the respondent.

By the Court, PRATT, J. It was held in *Quin v. Moore*, (15 N. Y. Rep. 432,) that the only condition on which the right of the administrator to sue under the statute depends, is the common law right of the injured person to maintain an action if he were living. That it is not required that the person killed should be a husband, father or protector. (See also *Oldfield v. Harlem Rail Road Co.*, 4 Kern. 316.) Under these decisions, this court sitting in the sixth district held, in the case of *Dickens, adm'r, v. The New York Central Rail*

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Road Co., (28 Barb. 41,) that the action could be sustained for the death of a married woman, although she left neither father, mother, child or descendant. These cases would seem to dispose of the one at bar. It is claimed on the part of the defendant that the person killed could not have sustained an action if living, and therefore it does not come within the statute; that this question was not involved in the case of *Quin v. Moore*, and that it was not raised or discussed in *Dickens v. The New York Central Rail Road Co.* I think this point is rather too fine. The statute, in allowing an action to be sustained in cases where an action would lie by the party injured if living, does not refer to the party in any technical or narrow sense. It manifestly looks to the cause of action, rather than to the particular parties whose names it might be necessary to use upon the record. The injured party, though a feme covert, would be the substantial party. Both the action and the cause of action would survive in case of the husband's death, while both would abate in case of her death. She is the meritorious cause of action, however the husband may be entitled to the fruits of the litigation. This point I think not well taken. Upon the other questions raised, I think the demurrer was not well taken. The judgment must therefore be affirmed, with costs.

[ONONDAGA GENERAL TERM, JANUARY 4, 1859. *Pratt, Bacon, W. F. Allen* and *Mullin*, Justices.]

JOHNSON, President, &c. *vs.* McINTOSH, impleaded with
Barker.

The provision in the 399th section of the code, that a party shall not be examined as a witness unless the adverse party or person in interest is living, does not exclude a party from being a witness when the opposite party is a corporation.

Contemporaneous parol stipulations, contradicting or varying the legal effect of written contracts, cannot be received in evidence.

A defendant, on a trial before a referee, set up a defense which, though valid, was not within the issue presented by the pleadings, and was not a mere variance in some particular but in the entire scope and meaning of the defense. No amendment was asked for, or made; and no objection to the evidence was made, until the close of the trial, the parties consenting that all objections to the evidence might be reserved until that time. At the close of the trial, the plaintiff objected to the evidence, as not being within the issue. *Held* that the objection was valid, and should have been allowed. BACON, J. dissented.

Held also, that the erroneous ruling of the referee, in receiving the evidence, was not cured by a subsequent order of the court, allowing an amendment of the answer.

Held further, that the order allowing the defendant to amend his answer was erroneous.

APPPEAL by the plaintiff from a judgment of the special term, on a report of a referee in favor of the defendant. The action was brought by the plaintiff, as president of the Ontario Bank, on a promissory note made by Henry L. Barker, dated June 1, 1857, for \$427 and interest, at three months, payable at the Ontario Bank to the order of Andrew J. McIntosh, and indorsed by him. The action was against both maker and indorser. The answer of McIntosh set up several defenses: 1. A general denial of indebtedness on the note, &c. 2. This part of the answer alleged that on the 7th of January, 1857, the Ontario Bank claimed a balance due from Barker, as overdrawn by him, of \$427, but which was denied by Barker. But on that day Barker, to pay said alleged overdraft, made his note for \$427, and delivered it to said bank; that McIntosh indorsed said note at the request of said bank, "under an express agreement" made with said bank by Lynch, its cashier and authorized managing agent, with said McIn-

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tosh, that he, McIntosh, "should not be liable on said note as indorser, or any note given to renew the same, unless he should realize from a chattel mortgage," made by Barker to McIntosh on said 7th January, 1857, to secure payment of said note and another note made by Barker and indorsed by McIntosh, "sufficient" to pay the last mentioned note, and then what might be realized on said mortgage should be paid on the above note for \$427, dated January 27, 1857, "so given to said bank as aforesaid." It was then alleged that the note in suit, dated June 1, 1857, was given in renewal of said note of January 7, 1857, and that McIntosh had not realized from said mortgage any thing to pay said note of \$427. Then follow allegations of an error in the account of Barker with the bank of \$275, and that he did not on the 7th January, 1857, owe the bank any thing, nor was there any consideration for the note. The cause was also at issue as to Barker, and was referred, October, 1857, to a referee. Trial in September and October, 1858. On the trial the note of 7th January was proved to be a note at four months, payable to the order of McIntosh, and indorsed by him. The note in suit was also proved; it was at three months, payable to the order of McIntosh, and indorsed by him. McIntosh was offered as a witness for himself, and objected to as incompetent, on the ground that the real plaintiff, the Ontario Bank, was a corporation. Objection overruled, and the plaintiff's counsel excepted. McIntosh was then sworn and testified; it being expressly agreed that the plaintiff might at the close of the case specify his objections to the evidence. McIntosh was examined on two different days. On the first day he swore to an arrangement between himself and Lynch, the cashier; that he, McIntosh, thereupon obtained of Barker the note of January 7. "I was acting as agent of Barker and the bank. I indorsed the note upon an agreement with Lynch that I should not be liable as indorser, and the note should be left with me for my protection and as the property of the bank." But a week or so after this note was made, the witness delivered it to Lynch. This note

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fell due May 10, 1857, and early in June the note in suit was made, to renew the first one, "and delivered to Mr. Lynch under the same terms." There was no written agreement as to this matter. On a second examination, on another day, McIntosh testified that he delivered to Lynch the note of 7th January, "as the property of the bank, as I held it, and for safe keeping." Egan, a witness for the plaintiff, testified that both notes were discounted by the Ontario Bank and proceeds credited to Barker. The cause was summed up, and the plaintiff's counsel stated his objections to the evidence of McIntosh.

1. That no such defense as the witness attempted to prove, was set up in his answer.
2. That to admit such evidence as that given by McIntosh would alter, contradict and nullify the written engagement of the indorser by parol evidence.
3. That Lynch, as cashier, had no power to make such an agreement as the witness stated.
4. That there was a good consideration for these notes.
5. That the evidence that McIntosh was agent was inadmissible, as the indorsement was as principal and not as agent.

On the 9th of October, 1858, the referee reported against Barker for the amount of the note, and in favor of McIntosh, finding the facts and conclusions of law. The defendant, in November, 1858, moved to amend his answer, which was opposed, but the motion was granted at a special term, November 30. The answer was accordingly amended. From said order the plaintiff appealed to the general term, where the appeal was dismissed at January term, 1859. Judgment was entered for McIntosh, January 21, 1859, and on the 4th of February, 1859, the plaintiff's attorney filed exceptions and served the same and a case.

A. M. Beardsley, for the appellant.

M. H. Throop, for the defendant.

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PRATT, J. I do not think that the objection to the examination of the defendant McIntosh, as a witness on his own behalf, was well taken. The provision of the 399th section of the code, that a party shall not be examined as a witness unless the adverse party or person in interest is living, does not exclude a party from being a witness when the opposite party is a corporation.

1st. The general rule is in favor of admission. The cases of exclusion are exceptions. To exclude, therefore, a party to a suit from the privilege of testifying in his own behalf, it must appear that the opposite party or person in interest is dead, or that the opposite party is an assignee, administrator, executor or legal representative of a deceased person. A corporation is neither of these. For while it cannot be said to be alive in the sense applied to natural persons, it cannot be said to be dead. It clearly has an existence. This restricting clause, therefore, cannot be applied to corporations.

2d. As corporations must necessarily act through living agencies, the reasons upon which this restriction was based do not apply to them, especially so long as the agents through whom the contract in controversy was made are alive. They would be proper and competent witnesses, and the considerations, therefore, which would exclude a party in the case of the death of the other party to the transaction, do not apply at all to the case of a corporation.

Indeed it has often, under the common law rule, been felt as a hardship, that the officers and agents of corporations who manifested all the feelings and interest of parties to the record should be allowed to testify and give their own version of the transaction, while the mouth of the other party, with no more apparent feeling and interest, should be closed in silence. The authors of the code manifestly did not design to perpetuate this evil.

But upon the other points in the case, I think there should be a new trial. The complaint sets out the execution of the

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note by one Barker, the indorsement by the defendant, delivery to the bank, and demand and notice. The answer, which formed the issue upon which the action was tried, admits all these averments, and alleges circumstances under which the indorsement was made, showing a sufficient consideration, but sets up as a defense a contemporaneous parol agreement by which the defendant was not to be made liable upon his indorsement, unless he should realize a certain amount from a chattel mortgage given by Barker to him, to secure him against his liability upon the indorsement. In other words, the defense set up in the answer was a parol stipulation, contemporaneous with the indorsement, that the latter should not create the liability which it purported upon its face to create, but that it was to take effect as an indorsement upon a certain condition which had not been performed. It is not necessary to cite authorities to show that contemporaneous parol stipulations, contradicting or varying the legal effect of written contracts, cannot be received in evidence. The answer, therefore, showed no defense to the complaint.

But the defendant upon the trial claimed, and so the referee has found, that there was in fact no consideration for the indorsement by the defendant; that the defendant in the whole transaction acted as the agent of the bank, and therefore indorsed the note merely to transfer the legal title to the bank. This, if true, was undoubtedly a good defense to the action, but was it proper to be admitted under the pleadings? It was clearly not within the issue presented by the pleadings. And it was not a mere variance in some particular, but in the entire scope and meaning of the defense. If the objection had been interposed to the evidence as it was offered, the referee, if he thought it not within the issue, might undoubtedly have allowed an amendment of the answer upon such terms as he deemed proper. But on the other hand, if the trial had proceeded upon the amended answer, the plaintiff, for aught is known, might have called the cashier and other witnesses

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to disprove this defense. But no amendment was asked for, or made. The parties on both sides seemed to consent that all objections to the evidence might be reserved to be made at the close of the trial. The objection to this defense was then made on the part of the plaintiff. No suggestion in regard to an amendment of the answer was made on behalf of the defendant. It seems to me, therefore, that the question presented is this, and this alone—was the objection a valid one upon the pleadings as they then stood? As I have already suggested, it is not a variance merely in some particular, but it is an entire change of the defense, and was therefore, upon the issue as it then was, clearly incompetent. The defense set up was unproved, not in some particular, but in its entire scope and meaning. And the consideration that if the answer set up had been proved it would have constituted no defense, cannot make the case any better for the defendant.

Nor is the case cleared of the difficulty by the subsequent order giving leave to amend the answer. That order was probably granted upon the assumption that the rulings of the referee were correct. And if the judgment be allowed to stand, the order was clearly proper. And this brings us right back to the question, whether the ruling of the referee was right or not. If wrong, it surely should not be deemed cured by the order allowing the amendment. It would be exceedingly dangerous to allow a party not only to prove a defense upon the trial which was not hinted at in his answer, but to contradict facts which he had admitted by his pleadings, and then, after a verdict or decision of the referee in his favor, to allow him to make a new answer to suit the proof. This would be carrying the privilege of amendment a little too far.

The order was therefore also erroneous and should be reversed, without prejudice to the right of the defendant to move to amend his answer.

Upon the whole, I think the exceptions to the report

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of the referee well taken, and that the judgment should be reversed.

W. F. ALLEN and MULLIN, Justices, concurred.

BACON, J. dissented.

[ONONDAGA GENERAL TERM, April 5, 1859. *Pratt, Bacon, W. F. Allen and Mullin*, Justices.]

 BRACY vs. KIBBE.

Although the law does not clothe a stepfather with the rights of a parent, growing out of that relation alone, yet where a person adopted the illegitimate daughter of his wife, into his family, and she was bred and brought up by him, it was held that he stood in *loco parentis* towards her, and could maintain an action for her seduction.

In such an action it is competent to show the circumstances under which the female was seduced, and the means used for corrupting her mind.

Evidence of previous lascivious conduct on the part of the girl is admissible. Where the female seduced, on her examination as a witness, swears that she had been induced to charge the child upon another person, by promises from the defendant, it is competent for the defendant to show that she not only said the child was not the defendant's, but that she went further, and said that she had been induced to charge it upon the defendant by the plaintiff and others, members of his family.

It is improper to admit evidence of the reputed good character of the female, when her general reputation has not been attacked.

THIS was an action brought by the plaintiff, William Bracy, against the defendant, for debauching Alvira Bracy and getting her with child, she being at the time, and from her infancy up, the plaintiff's servant, by reason whereof he not only incurred expenses for her lying in, but lost her services. The defense was a denial of the allegations of the complaint, and an averment that the female alleged to have been seduced was the illegitimate child of the plaintiff's wife, born previous to the plaintiff's marriage with her mother, and

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that she never sustained the relation of servant to the plaintiff. The cause was referred to a referee, who found the following facts: That the plaintiff intermarried with the mother of Alvira Bracy when Alvira was about two years of age; that Alvira was an illegitimate child; that at the time of such marriage the plaintiff took Alvira home, and that she had ever since been in his family, and been provided for by the plaintiff as his own child, and that she labored for the plaintiff as a servant in his family for several years prior to and at the time of the seduction and carnal knowledge hereinafter mentioned, and till a short time prior to the birth of her child; that in the month of August, 1854, the defendant seduced and had carnal connection with the said Alvira; that from such connection she conceived and bore a child, which was born the 22d of May, 1855, which child is still living; that the plaintiff provided a physician for her during her said confinement, and took care of the said Alvira and her said child up to the commencement of this suit; that the said Alvira was 15 years old in November, 1856, and that she was the servant of the plaintiff at the time of said seduction and carnal knowledge. And the referee found that the plaintiff had sustained damages by reason of such seduction and carnal knowledge, to the amount of \$200. And he found, as conclusions of law, that the plaintiff was entitled to recover of and from the defendant for the damages aforesaid, the sum of \$200.

On the trial before the referee, Alvira Bracy was examined as a witness; and having testified to the seduction, she was asked by the plaintiff's counsel whether the defendant, at any time before he had connection with her, showed her lascivious books? This was objected to, as leading and incompetent. The referee overruled the objection, and the defendant excepted. The witness answered that he did; that some pictures in the book were men and women naked. The witness was asked whether, on a certain occasion, she had not said to one Millard that, some time when alone with him, she would have connection with him? This was objected to, as improper

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evidence, and excluded by the referee. The witness was asked by the plaintiff's counsel, "Did you agree to live with the plaintiff until you were eighteen?" Objected to by the defendant as improper evidence. The referee admitted the evidence. The witness testified that when she was a little girl, six or seven years old, she promised to live with the plaintiff; that this was all the bargain ever made. A witness was asked what was Alvira's Bracy's conduct with young men? This was objected to, and the evidence excluded. The same witness was asked whether he knew of any acts of Alvira, before July, 1854, of a lewd and lascivious character, with Henry Gilson? This also was objected to, and excluded. Another witness, having stated that she had known Alvira since she was a small child, was asked what had been her character and deportment. This was objected to by the defendant as incompetent, on the ground that he had not attacked her character, except by specific acts, and the plaintiff was not permitted to show her general good character. The referee overruled the objection, and the defendant excepted. From the judgment entered upon the report of the referee the defendant appealed.

C. Whitney, for the appellant.

L. Downing, for the respondent.

By the Court, PRATT, J. There existed in this case the relation of master and servant between the plaintiff and the girl seduced, which would entitle the former to sustain his action for loss of service. Although she was the illegitimate daughter of his wife by another man, and the law did not therefore clothe him, from that relation alone, with the rights of a parent, yet in this case it appears that the girl had been actually adopted by him into his family and had been bred and brought up by him. He stood, therefore, *in loco parentis*, and was clearly entitled to sustain the action. (*Bartley v. Richtmyer*, 2 Barb. S. C. R. 182. S. C., 4 Comst. 38.) The action

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will lie in favor of a guardian, (3 *Watts & Serg.* 416,) or an uncle, or aunt, who has brought up a niece, (2 *Car. & P.* 303, 2 *D. & E.* 4,) or one who has adopted and bred up the daughter of a deceased friend. (11 *East*, 23. 5 *Barb.* 661.)

I think the evidence, also, of the circumstances under which the girl was seduced, was proper; as the damages are not confined to mere loss of service, but the jury are allowed, by way of damages, to compensate the plaintiff for the injury to his feelings, any circumstances of aggravation must be admissible. But I think the referee erred in excluding evidence of previous lascivious conduct on the part of the girl. One of the considerations entering into the question of damages is the supposed loss on the part of the parent of the society of a chaste and pure daughter. If, therefore, the daughter had already become impure, the loss in that respect would be much less. All the authorities concur that such evidence is admissible. (1 *Greenl. Ev.* § 54. 2 *id.* § 577. 7 *C. & P.* 308. 1 *Phil. Ev., Edw. ed.* 760.) I think the evidence of the statement of the girl that her folks tried to induce her to charge the child upon the defendant, was improperly rejected. She had been interrogated in regard to her saying that Bracy, and not the defendant, was the father of the child, and had attempted to explain it upon the stand, by swearing that she was induced to charge it to Bracy by promises from the defendant. To meet this supposed explanation, it was clearly competent to show that she not only said the child was not the defendant's, but that she went further and said that she had been induced to lay it upon the defendant by the plaintiff and other members of the family. It was proper, in contradiction of the statement, that she had been induced to lay it upon Bracy by the defendant. For while she might be induced by the defendant to say the child was not his, there would be no necessity of her charging her parents with conniving at her accusations against the wrong party. It was therefore competent upon the question of credibility.

It was also improper to allow evidence of the reputed good

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character of the girl. Her general reputation had not been attacked. Most of the evidence of specific acts of lewdness had been excluded. Her general reputation, therefore, did not appear to be in issue. (3 *Seld.* 378. 4 *Comst.* 493. 1 *Cowen*, 530.)

These are all the errors which I have been able to discover in the rulings of the referee. The evidence in relation to the contract could not possibly do any injury. Besides, it was competent to show that the plaintiff had actually adopted her, and that she stood actually in the relation of servant to him.

Judgment reversed, and new trial ordered.

[ONONDAGA GENERAL TERM, April 5, 1859. *Pratt, Bacon, W. F. Allen* and *Mullin*, Justices.]

BABBOTT and wife vs. THOMAS.

In an action brought by husband and wife, to cancel a bond and mortgage executed by them, and to restrain the foreclosure of the mortgage, the husband offered himself as a witness to prove usury in the consideration. *Held* that the husband was a competent witness on his own behalf, notwithstanding the wife's interest in the event of the suit, by reason of her inchoate right of dower in the mortgaged premises.

APPREAL by the plaintiffs from a judgment entered upon the report of a referee, dismissing the complaint.

F. Kernan, for the appellants.

Ward Hunt, for the defendant.

By the Court, PRATT, J. The action in this case was brought to cancel a bond and mortgage and to restrain the foreclosure of the mortgage. The mortgage was executed by Babbott and wife, and the plaintiffs claim that it was given upon a usurious consideration. On the trial Babbott offered

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himself as a witness, to prove the usury. Upon objection by the defendants he was excluded, upon the ground that the wife was interested in the event of the suit, having an inchoate right of dower in the mortgaged premises. This is the only question in the case.

I think the husband was a competent witness on his own behalf. In the first place, the wife was not a necessary party to the suit. If she could be affected by the result of the suit, it would not be in consequence of any direct adjudication upon her rights, but from the adjudication upon the rights of her husband. If the suit had been brought by the husband alone, the effect of an adjudication, I think, would be precisely the same. If he should succeed in procuring the bond and mortgage to be canceled, the land would be free from the mortgage as well in regard to her inchoate right of dower as to the husband's fee. So, on the other hand, had he failed, it would for ever be conclusive upon the question of usury. She might as well be made a party in an action of ejectment by or against the husband. Her inchoate right of dower is not such a right as to be capable of being established or divested by a judicial determination against the wife directly.

In the second place, the inchoate right of dower in the wife is not such an interest as will exclude the husband from being a witness in a suit which involves the title or interest of the husband upon which such inchoate right of dower depends. Had a suit been brought against the husband, upon the bond, it seems to me the wife's interest would be precisely the same. It is a remote contingent interest which would not render the wife herself, at common law, incompetent upon the ground of interest.

The interest that excludes "must be a present, certain and vested interest, and not an interest uncertain, remote or contingent." (1 *Greenl.* § 390. 1 *Salk.* 283. 5 *John.* 256. 1 *id.* 491.)

It can scarcely be claimed that the inchoate right of dower is a vested interest. Again; in collateral proceedings not directly, nor immediately affecting their interests, the husband

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and wife are competent witnesses. (1 *Phil. Ev.*, *Edwards'* ed. 84. 1 *Greenl.* 142.)

Under the code it is not the interest which excludes, at all, but considerations of public policy. And the same policy requires that when the interests of others are involved directly, and that of the husband or the wife only collaterally or remotely, they should not be excluded. (1 *Phil. Ev.* 86. 1 *Strange*, 504.)

The principle of exclusion which, within proper limits, is a salutary one, should not be extended beyond the cases wherein the immediate and direct interests of the husband and wife are involved.

It was held in *The City Bank v. Bangs et al.* (3 *Paige*, 36,) that a wife might be examined as a witness between other parties, although the husband had a collateral interest in opposition to the party calling her. The same was decided in *Fitch v. Hill*, (11 *Mass. Rep.* 286.)

Upon the whole, I think the judgment should be reversed, and a new trial ordered.

[ONONDAGA GENERAL TERM, April 6, 1859. *Pratt, Bacon, W. F. Allen and Mullin*, Justices.]

 WHITE vs. NELLIE.

A master can maintain an action for the seduction of his servant, although pregnancy did not follow the illicit intercourse, if there is proof, sufficient to be submitted to the jury, of a loss of service, as the result of the seduction.

THIS was an action of trespass on the case, for debauching and getting with child, Jane, the minor daughter of the plaintiff, and for imparting to her a venereal disease, by means of which the plaintiff lost her services, and was obliged to expend a large sum of money for the expenses of her lying in, &c. and for procuring her cure of said disease. The defend-

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ant, by his answer, denied the allegations of the complaint. The cause was tried at the Oswego circuit, in December, 1856. The fact of the illicit intercourse between the defendant and the female, and that he communicated to her a venereal disease, was proved by the girl. It also appeared that she was a minor, and lived with her father, at his house. The physician's bill for curing her of the disease was near \$30. There was no proof of pregnancy, or birth of a child. The defendant moved for a nonsuit, on the ground that the relation of master and servant had not been proved, so as to entitle the plaintiff to recover, which motion was denied, and the defendant excepted.

The defendant's counsel asked the court to instruct the jury, 1st. That loss of service from a disorder contracted by the illicit intercourse, was not sufficient ground to sustain the action. 2d. That in this case there was no sufficient proof that the girl's disease was taken from the defendant, she having admitted and proved that she, at about the same time, had connection with two other persons. 3d. That the loss from her pregnancy (if the jury believed it proved) occurred while she was yet in the defendant's service, and would not support the action. The justice charged the jury, refusing the instruction asked for by the defendant, in the first proposition above stated. The court refused to charge as requested in the second proposition, but submitted it as a question of fact to the jury, and instructing them as prayed in the last proposition. And to such refusal to charge as requested, the defendant excepted.

The jury found a verdict in favor of the plaintiff for \$500; and from the judgment entered thereon the defendant appealed.

C. B. Sedgwick, for the appellant.

O. Whitney, for the respondent.

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By the Court, PRATT, J. This case presents the simple question whether a master can maintain an action for the seduction of his servant, in a case where pregnancy does not follow the illicit intercourse. There was in this case proof, sufficient to be submitted to the jury, of a loss of service as the result of the seduction. I think no sufficient reason has been suggested why the action, in such case, will not lie. The wrongful act of the defendant consists in the seduction, and the loss of service constitutes the resulting damage, to recover which the action is brought. If the loss of service actually occurs as the direct and immediate effect of the seduction, I know of no principle of law that should confine the action to cases of pregnancy alone. It is true, that in actions for seduction, pregnancy has generally followed the seduction. There are two reasons for this. In the first place, there is generally no loss of service, except in cases of pregnancy. In the second place, when the seduction is not made public by pregnancy, no probable amount of damages would induce the parents to make public the shame of their daughter, by the commencement of an action in the courts. But when the loss of service has actually been sustained, as the direct effect of the seduction of the child, no suggestion has been made why the action will not lie. The seduction is the wrong, and the loss of service the damage. It is therefore *damnum et injuria* which constitute the proper elements for an action on the case. (3 *Stephens' N. P.* 2353.) When there is no loss of service it is *damnum absque injuria*, and no action will lie.

We have not been referred to any case in which the position taken by the appellant has been sustained. The case of *Knight v. Wilcox* (18 *Barb.* 212) was first tried before me, and I nonsuited the plaintiff on the ground that no loss of service was proved resulting directly from the illicit intercourse. My ruling was set aside by the court, at general term, sitting in the 7th district, and the plaintiff, upon a new trial, had a verdict. But the court of appeals eventually sustained my ruling at the circuit. (4 *Kern.* 413.)

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In neither court, however, was the ground taken that in no case could the action for seduction be sustained without pregnancy, but the contrary position was assumed in both courts.

In *Manvell v. Thompson*, (2 Car. & Payne, 303,) the action was sustained when there was no pregnancy. So in *Boyle v. Brandon*, (13 Mees. & Welsby, 788,) the action was for seduction when there was no pregnancy, and the question was whether there was any loss of service resulting from the seduction proved, and the court thought there was none.

The girl in that case had been seduced and had lived in a state of illicit intercourse with the defendant. He afterwards deserted her, and in consequence of such desertion the girl was distressed in mind and became ill. The chief baron, in his opinion, thought that the desertion, the breaking off of the criminal intercourse, and not the seduction, was the cause of the sickness, and that the plaintiff ought not to recover. It seemed to be assumed, all through the case, that if the distress had resulted from the seduction *itself*, the plaintiff could have sustained his action.

Upon the whole, I think the judgment should be affirmed.

[ONONDAGA GENERAL TERM, April 5, 1859: Pratt, Bacon, W. F. Allen and Mullin, Justices.]

THE CITY OF BROOKLYN vs. THOMAS TOYNEBEE.

A municipal government may be authorized to pass ordinances imposing new and superadded penalties for acts already penal by the laws of the state.

In an action to recover penalties incurred under the ordinance of the city of Brooklyn of July 3d, 1850, "to prevent the sale of certain commodities" in that city "on Sundays," for exposing to sale and selling liquor, on that day, it is erroneous, after proof of selling, only, for the judge to charge the jury that the plaintiffs are entitled to recover one penalty for exposing to sale, and one penalty for selling liquors, &c. on the same Sunday.

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Under that ordinance a party is not liable to two penalties for the same act, one for exposing to sale, and the other for selling.

Every sale necessarily includes an offer of the goods sold ; and one single act of selling cannot be divided into two offenses.

APPEAL from a judgment of the city court of Brooklyn. The action was brought for the violation of an ordinance of the city of Brooklyn. The complaint contained 104 counts, and sought to recover 104 penalties of \$50 each, amounting in the aggregate to \$5200, for exposing for sale, and selling, liquor on the sabbath, in violation of the ordinance. The verdict was for \$800, the aggregate of sixteen penalties ; one moiety thereof being for the *sale* of the liquor, and the other moiety for *exposing* it in the act of sale. The defendant kept a hotel, and the only cause of action pursued at the trial, was the sale of liquor at that hotel on several sabbaths. The counts for exposing for sale were not supported by proof, except as exposure is necessarily involved in the act of selling. The court instructed the jury that the plaintiffs were entitled to one penalty for each sale of liquor, and another penalty for each exposure on such sale—in effect doubling each penalty. Judgment was rendered for the plaintiffs pursuant to the verdict, and the defendant appealed therefrom.

J. M. Van Cott, for the appellant.

Henry Hagner, for the respondents.

· **EMOTT, J.** It is contended that the ordinance upon which this suit was brought, or at least that portion of it which forbids the sale of liquor on Sunday, is void upon the principles supposed to be laid down by Mr. Justice Strong in *Wood v. City of Brooklyn*, (14 Barb. 425,) to which we were cited. Obviously, however, that case is not in point. The plaintiff, there, was the possessor of a license to sell liquor as a tavern-keeper, granted by the state authorities, and the question was whether the city of Brooklyn had power to prohibit an act

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which a law of the state and the license granted under it, not only did not forbid, but expressly permitted. Here the defendant in the court below was not a licensed innkeeper, and did not pretend to any rights or privileges other than such as are common to all the citizens of Brooklyn. It would be going much farther than the learned justice in the case referred to went, and farther than he seems to have been disposed to go, if we were to hold that the ordinance in question is wholly void because it is rendered inoperative as to certain persons by the privileges and permissions conferred upon them by licenses granted under the laws of the state. It may be that as far as a municipal ordinance conflicts with, or contravenes, a law of the state, in the case of any individual, it may be void; but it does not follow that it is void in toto, or as to every one else. It may easily be shown upon principle and authority—and the learned judge in the case of *Wood v. The City of Brooklyn* sanctions this view—that a municipal government may be authorized to pass ordinances imposing new and superadded penalties for acts already penal by the laws of the state. We cannot yield to the objection that this ordinance was void because a statute of the state had already prescribed penalties for the acts here forbidden under new penalties. It must be added, in reference to the objection founded on the fact that licenced as well as unlicenced persons are within its terms, that at the time of the offense for which this suit was brought no such licenses existed or were allowed, and there was in fact no conflict between the law of the state and this ordinance.

At the trial in the city court, the plaintiff, as it is stated in the bill of exceptions, “proved the sale of goods or liquors by the defendant on Sundays as is alleged in the complaint, during the year prior to December 30, 1855” This was all the evidence in the cause, and upon this the city judge instructed the jury “that the plaintiffs were entitled to recover one penalty for exposing to sale and one penalty for selling liquors or merchandise mentioned in the complaint on the same Sunday;” to which the defendant excepted. If there had been proof of

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any act of exposing goods for sale other than the sales consummated and proved—that is, if there had been proof of an offer or exposure of liquors or goods at one time, and subsequently a sale at another time on the same day—then the question would have been presented which was argued at the bar, whether there can be more than one offense committed against this ordinance by all that is done on any one Sunday, or more than one penalty recovered for several acts done contrary to its provisions on the same day. But as the proof of sales by the defendant conformed to the complaint, and that alleged substantially a single sale on each Sunday, and no exposing to sale other than the actual sales was proved, we think this question does not arise, on the evidence. We therefore decline to express any opinion upon it.

A serious question, however, arises upon that part of the charge of the city judge, which we have quoted; that is, whether the defendant was liable to two penalties for the same act, one for exposing to sale and the other for selling. But one act is stated to have been proved on any Sunday, and that act in each case was a sale. There is no proof that any thing was exposed to sale that was not immediately and at the time of such exposure sold. The city judge, however, in effect instructed the jury that every such sale involved two acts, first an exposing, and second a sale, and rendered the defendant liable to both the penalties inflicted by both sections of the ordinance. In this he was clearly wrong. The law was aimed at different acts of a different character. Its object was to prevent a desecration of the Lord's day, and the design of its two sections was to punish this as well when done by opening a shop or a tavern and exposing wares for sale, without being able to induce any one to buy, as when perpetrated by the actual sales of property. One single act of selling cannot, however, be divided into two offenses. Every sale necessarily includes an offer of the goods sold, just as every crime includes the attempt to commit it. But the attempt, when successful,

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is merged in the crime, and the exposing or offering is only a part of the sale when a sale is made.

These are the only questions presented by the bill of exceptions, and they are therefore the only questions which we can decide, or upon which we are called to express an opinion. For the erroneous ruling of the court below upon the point just considered, there must be a new trial ; and the judgment is accordingly reversed, and the cause remitted to the city court to that intent.

W. B. WRIGHT, J. I entirely concur in the reasoning and conclusion of my brother EMOTT. The judgment should be reversed and a new trial ordered, with costs to abide the event,

DAVIES, J. also concurred.

New trial granted.

[ORANGE GENERAL TERM, July 7, 1857. *Wm. B. Wright, Davies and Emott, Justices.*]

SYLVESTER and others vs. RALSTON.

To authorize an action for use and occupation, the conventional relation of landlord and tenant must exist, between the parties.

Where one goes into possession of land under a contract to purchase, and not as tenant, and in consequence of the vendor's failure to perform the contract, the purchaser abandons the premises, he will not be liable either for rent, or for use and occupation.

Where the owner of land dies, leaving a widow and infant heirs, the widow becomes vested with the powers of a guardian in socage, and as such is authorized and required to take the rents and profits of the land for the benefit of the heirs. And the legal intendment would be that from the time of her husband's death, she occupied as guardian in socage.

If, during the minority of the heirs the relation of landlord and tenant exists at all, in respect to their lands, it must be between the mother and the tenant ; and if any action to recover rent, or for use and occupation, can be sustained, it must be brought by her, and not by the heirs.

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APPEAL from a judgment entered at a special term, upon the report of a referee. The plaintiffs are infant children of John A. Sylvester, late of Denmark, Lewis county, deceased, who died in September, 1850. This suit was commenced about January 23d, 1854, to recover for use and occupation of certain lands, inherited by the plaintiffs from their father. Lucy Ann Sylvester, the mother of the plaintiffs, was living when the suit was commenced, having intermarried with Alvin H. Hall on the 30th day of March, 1853. The plaintiffs had no guardian until the appointment of the said A. H. Hall, January 17, 1854, and resided with their mother. About the 11th day of January, 1853, the said Lucy Ann Sylvester and N. B. Sylvester, as administratrix and administrator of said J. A. Sylvester, made an arrangement with the defendant to sell him the land in question, intending to procure a title for him thereto, through a sale under a surrogate's order. A written agreement was entered into, signed by N. B. Sylvester as administrator, and the defendant. At the same time, Mrs. Lucy Ann Sylvester sold the defendant 20 cows and some other property. The land and the cows were to be paid for, in part, by means of two mortgages, amounting to about \$2000. Both the land and personal property so sold were in the actual possession of said Lucy Ann Sylvester at the time the bargain was made, she and the plaintiffs then living together on the land. March 1st, 1853, the said Lucy Ann Sylvester delivered possession of the land to the defendant, and also at the same time delivered to him the cows, &c. The defendant entered into possession, made certain improvements in the fences, buildings, &c. on the land, and cultivated the land during the season of 1853, to October 18th, or thereabouts. The agreement was not fulfilled on the part of N. B. and L. A. Sylvester, and the defendant failed to procure a title. About October 12, 1853, a controversy arose between the defendant and Lucy Ann Hall, (formerly Sylvester,) and various proposals for a settlement were made, but not agreed upon, including the claim for cows, and the use of the land, &c. Nathaniel

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B. Sylvester and William Collins were employed in relation to the difficulty with the defendant, and to secure what was claimed of the defendant for cows and use of the land. They were fully empowered to compromise or settle in any way. The whole matter in controversy was fully settled, October 18th, 1853, by the defendant paying \$500. The money was paid by the defendant and received by Mrs. Hall, after full notice of the settlement. The defendant delivered to Mrs. Hall the possession of the premises pursuant to the settlement in November, 1853.

The referee refused to nonsuit the plaintiffs, and reported that the sum of \$200 was due to them from the defendant.

E. A. Brown, for the appellant.

Bennett & Hawley, for the respondents.

By the Court, PRATT, J. There seem to be two difficulties in the way of the plaintiffs' recovering, in this case. *First*. The defendant went into possession under a contract to purchase, and not as tenant. The contract not having been performed by the vendors, the defendant incurred no liability to them by leaving the premises. Had the vendors been the owners of the land, it is clear that they could not have sustained an action, either upon the contract or for use and occupation. They could not have sustained the former, for the reason that they had not performed on their own part; and they could not have sustained the latter, whether they had performed or not, for the reason that the conventional relation of landlord and tenant did not exist. That relation must exist, to authorize the action for use and occupation. (5 *John*. 46. 1 *Denio*, 38. 25 *Barb*. 243. 13 *John*. 489.) And if the vendors could not sustain the action for use and occupation, it will scarcely be claimed that the plaintiffs can sustain it. There was clearly no relation of landlord and tenant between them and the defendant.

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Secondly. If the defendant was tenant to any one, he was tenant to Mrs. Hall, and not to the plaintiffs. By the death of her first husband, who died seised of the farm in question, the mother became vested with the powers of a guardian in socage, and as such was authorized and required to take the rents and profits of the land for the benefit of the infant heirs. (1 R. S. 718, § 5. 7 John. 157.) The legal intendment would be, that from the time of her husband's death until the defendant went into possession, she occupied as guardian in socage. (7 John. 157.) She was privy to the contract with the defendant, and assented to it. If, therefore, the relation of landlord and tenant existed at all, it must have been between Mrs. Hall and the defendant; and if any action to recover rent, or for use and occupation, could be sustained at all, it must be by her. The same would also be true in regard to trespass, or any other action for injury to the possession.

The case of *Beecher v. Crouse* (19 Wend. 306) is in point. In that case the father of the plaintiffs died intestate, in 1820, leaving a farm which descended to the plaintiffs as his heirs at law. His widow, the mother of the plaintiffs, married again in 1822, and, with her husband, occupied the farm until 1830, the plaintiffs in the suit living with them. The crops raised upon the farm in 1830 were taken by the defendants under an execution against the husband and stepfather, and for that the action was brought by the heirs. The court held that the mother and stepfather were presumed to be lawfully in possession of the products of the farm—the mother as guardian in socage and the stepfather *jure uxoris*, and that the plaintiffs, the heirs, could not sustain the action. (See also 2 Kent's Com. 222; 7 Wend. 45; 15 id. 631; 17 id. 77.) These objections dispose of the case, and it is not necessary to examine the question of fact presented.

Judgment reversed, and a new trial ordered, and reference vacated.

[ONONDAGA GENERAL TERM, October 4, 1859. Pratt, Bacon, W. F. Allen, and Mullin, Justices.]

STEVENS *vs.* THE BANK OF CENTRAL NEW YORK and THE
ILION BANK, impleaded, &c.

A prior judgment, confessed by two partners in a firm consisting of three members, for the purpose of securing a partnership debt, is a lien upon the interest of the two in the partnership property; and is entitled to priority in payment, out of the surplus moneys arising from a sale of the property under a mortgage, over subsequent judgments recovered against all the members of the firm.

In such a case the rights of the parties must be determined by the priority of their legal liens; and the holder of the prior judgment will be entitled to two thirds of the fund, and the subsequent judgment creditors to one third.

THE question presented in this case was, who was entitled to the surplus moneys arising upon a mortgage sale of real estate owned jointly by Daniel Mason, Henry C. Johnson and Peter J. Hotaling, which they purchased April 24, 1856, of John Stillwell, and for which they gave the mortgage by virtue of which the sale was made. The surplus moneys amounted to \$985.07. The material facts found by the referee, and undisputed in the case, were these: On and prior to September 3, 1855, Mason and Johnson were partners in the business of distilling, under the name of D. Mason & Co. Pruyn & King had become their indorsers to the extent of \$10,000, and for their indemnity as such indorsers Mason and Johnson gave them a statement dated September 3, 1855, authorizing the entry of a judgment against them for \$10,000. This statement was in their own name, and did not profess to be for or in behalf of any other person. No judgment was entered on this statement until December 24, 1857, when it was entered. Sept. 5, 1855, Hotaling entered into copartnership with Mason and Johnson in the same business, and the three continued partners until January 11, 1858, under the name of D. Mason & Co., when the company failed. Hotaling, at some time in the course of the business, had notice of the judgment Mason and Johnson had given Pruyn & King, and that they indorsed for the company. Pruyn & King continued to indorse for the company until January 11, 1858. April 24, 1856, the firm,

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consisting of the three, purchased the real estate in question with company funds, and it was conveyed to the three partners, and the property was used by the company in its business. Some time in Sept. 1857, Mason applied to the plaintiff to indorse for the company after P. & K., and agreed with the plaintiff that Pruyn & King should assign to him an interest in their judgment to the amount of \$6000, to secure him; and on that condition the plaintiff agreed to indorse to the extent of \$6000 for the company. September 10, 1857, P. & K. assigned that amount of interest in the judgment, and on the faith of that assignment the plaintiff some time in September indorsed the company notes to \$4000, and October 8 he indorsed the company note to \$6000, including a renewal of the \$4000. About the 1st of October, Hotaling was informed the plaintiff had been procured to indorse for the company, and of the security given. January 19, 1858, Mason and Johnson confessed a judgment to the plaintiff for \$6110, the amount of his indorsements. The Ilion Bank, August 19, 1857, discounted for D. Mason & Co. their note, indorsed by Pruyn & King, for \$1000; and Sept. 18, 1857, discounted for D. Mason & Co. another note of the same kind, and of the same amount. Oct. 8, 1857, D. Mason & Co. renewed those two notes by their note indorsed by Pruyn & King, for \$2000. The \$2000 note was protested, and the Ilion Bank, Feb. 8, 1858, recovered a judgment on that note against Mason, Johnson and Hotaling, for \$2046.84. D. Mason & Co. and Johnson, Mason and Hotaling were each insolvent six months before January 11, 1858, and still are.

Upon these facts, the referee held as a matter of law, that the judgment in favor of Pruyn & King against Mason and Johnson alone was a lien on all the real estate in question, conveyed to and owned by Johnson, Mason and Hotaling. That the said judgment against Johnson, Mason and Hotaling took no interest in the real estate, before the other judgment. That the judgment against Johnson and Mason held Hotaling's interest in the land in preference to a subsequent judgment

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against Hotaling, &c. From the judgment entered upon the report of the referee, the Bank of Central New York and the Iliion Bank appealed.

E. J. Richardson, for the appellants.

F. Kernan, for the respondent.

By the Court, PRATT, J. If necessary to the determination of this appeal, I should be inclined to hold the judgment in favor of Pruyn & King void, as not being authorized by the code. The contingent liability mentioned in the code, and to secure which a judgment by confession is authorized, is a liability already contracted and inchoate, such as the liability created by indorsement, guaranty or other suretiship. It was not, in my opinion, designed to be extended to contracts or liabilities thereafter to be created. But it is not necessary to decide this point, as the judgment in favor of Stevens, against which no such objections can be taken, was older than the judgments of the appellants. And I can perceive no reason why it is not as available to the plaintiff as the former. Both are judgments against two of three partners, to secure a partnership liability. And there is no stronger equity in the one than in the other, in favor of making it a lien upon the interest in the land of all three of the partners. It is said that Hotaling knew that the judgment was given to Pruyn & King to secure them for their indorsements for the firm, and that he knew of and assented to the assignment to the plaintiff to secure him for indorsing for the firm. But I find no evidence that he agreed or consented to its being made a lien upon his own interest in the premises. Although he knew of the judgment, and for what purpose it was given, he also knew that it was a legal lien only on the interest of the defendants, in the premises. I cannot, therefore, conceive how his knowledge of it, or his consent that the lien upon the shares of his partners should be transferred to the plaintiff to secure him, should have the effect to extend the lien to his own interest in the land.

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The two judgments, therefore, in my opinion, conceding both to be valid, stand upon precisely the same footing, and secure to the plaintiff the same rights. The question then comes up, What are those rights? I assume that the judgment to the plaintiff was given to secure a partnership liability, and that the land was purchased for partnership uses and paid for with partnership funds. The plaintiff's judgment, since the order of Judge Allen striking out Hotaling's name as a defendant therein, is a judgment against two of these partners, and is prior in point of time to the judgments of the appellants, which were confessed by all of the defendants. The fund is to be treated precisely as if it had been the proceeds of the sale of the land upon all the judgments. Under these circumstances, the rights of the parties must be determined according to the legal priority and extent of the liens of all the parties. The suit was not brought to settle up the partnership concerns and distribute the assets. In such a case equality would be equity. But it is brought based upon the lien of the plaintiff, and to enforce it against the land, which has been converted into money. And that lien only extends to the interest of two of the partners. To that extent it should be limited. I cannot perceive how, upon any principles of equity, it can be extended beyond that. So far as the interest of Hotaling is concerned, the plaintiff's demand, if it is not merged in his judgment, is a mere contract debt, and can have no precedence, at least over the demands of the banks, if their demands had not been put in judgment. But having put them in judgment and thus acquired a lien upon the land, the appellants have acquired a preference over all creditors by simple contract.

But it is claimed, on the part of the appellants, that as their judgment is against the firm, and a lien upon the lands of the firm, it should have a preference over the judgments of individual creditors, although prior in point of time. There may be some question whether this would be true as an abstract proposition, (*Meech v. Allen*, 17 N. Y. Rep. 300;)

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whether a court of equity could thus modify the legal effect of the lien which the statute gives. But in this case the equity upon which it is claimed that the priority of the judgment, which is first in point of time, should be postponed to give place to junior judgments, is met by a counter equity growing out of the fact that the plaintiff's judgment was given to secure a partnership liability; that if two thirds of the surplus money be applied upon that, it will be applied in extinguishing so much of the partnership liability. That liability is in nowise discharged by the judgment; for it was only given as a collateral security, and does not merge the debts held against the firm for which the plaintiff is liable. Thus this assumed equity on the part of the appellants being met by an equal equity on the part of the plaintiff, the rights of the parties must be determined by the priority of their legal liens. The result is that the plaintiff is entitled to two thirds of the funds, and the appellants to one third. The judgment must therefore be reversed, and a new trial granted, unless the parties consent to a modification of the judgment as above suggested. In such case it should be modified without costs of the appeal.

[ONONDAGA GENERAL TERM, October 4, 1859. *Pratt, W. F. Allen and Mullin*, Justices.]

ALVORD and others *vs.* LATHAM and others.

Where a contract for the sale and purchase of property has been executed, by the delivery of the property to the purchaser, the latter becomes vested with the title to it; at least so far as persons receiving the same from him to sell on commission, are concerned. And whether the property was originally obtained by the vendor under an illegal contract, or not, does not affect the question of the liability of the consignees to account to the consignor for the moneys received by them upon the sale of the property. The undertaking of the consignees to sell the property for the consignor on commission is upon a new and distinct consideration, having no actual or neces-

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any connection with the original contract. And the consignees are in nowise privy to that contract, or in a position to question the title of the consignors, to the property.

It is competent for the owners of property to impose upon their agents for the sale thereof, such restrictions as they may deem necessary to restrain them from interfering with their agencies in other parts of the country.

Even if such restrictions were to be deemed in restraint of trade, and therefore not binding upon the agents, that would not give to the latter the right to retain money in their hands which they have collected as the agents of the owners of the property, and which belongs to such owners.

APPEAL by the defendants from a judgment entered upon the report of a referee. The plaintiffs, in 1857, consigned to the defendants salt for sale, upon commission, on account of and as agents for the plaintiffs. The recovery was for moneys received by the defendants upon the sale of salt, under this arrangement, and not accounted for. The referee found that the Onondaga Fine Salt Company sold and delivered the salt to the plaintiffs, in pursuance of a written contract, and that the said company was an illegal organization, and that the contract was void on the ground that it was made for the purpose of increasing, regulating and fixing the price of salt, contrary to the statute. He further found that the defendants were not connected with the Fine Salt Company; and that in selling salt, they acted solely under their contract with the plaintiffs, as commission merchants. He reported in favor of the plaintiffs for the amount claimed.

Ruger & Lester, for the appellants.

Sedgwick, Andrews & Kennedy, for the respondents.

By the Court, PRATT, J. This action was brought by the plaintiffs against the defendants upon drafts and notes accepted and made by them, and for money received by the latter for salt sold by them on commission, for the plaintiffs. The plaintiffs were partners, doing business in the city of Syracuse, under the style and firm of "The Salt Dealer's Company."

Alvord v. Latham.

Their business, as specified in the articles of copartnership, was the purchase and sale of salt made on the "Onondaga Salt Springs Reservation." The defendants were a firm in the city of Oswego, whose business was "forwarding, commission and dealing in coal, salt, water-lime and other things." The consideration of the drafts and notes was money received by the defendants for salt sold by them for the plaintiffs. The salt was obtained by the plaintiffs upon a contract made by them with certain corporate companies located in the city of Syracuse, which the referee found were organized for the purpose of increasing, regulating and fixing the price of salt, and the amount of the same to be manufactured, and were therefore illegal. He also found that the contract between the plaintiffs and those companies was made to carry out the same illegal purpose, and was also void; but that the contract of partnership between the plaintiffs themselves was not made for that or any illegal purpose. The defendants interpose two objections to the plaintiffs' right to recover. First, that the contract between the plaintiffs and the corporate companies was void. And secondly, that the contract with the defendants was in restraint of trade, and void. Upon the first objection it is not perceived how the fact that the plaintiffs acquired the salt through an illegal contract, can affect their rights as against the defendants. The illegal contract having been executed by the delivery of the salt to the plaintiffs, they became vested with the title to it, at least so far as the defendants were concerned. And whether the contract of the plaintiffs' partnership was entered into for an illegal purpose, cannot affect the question. After the salt became their own, they surely had the right to sell it; and having that right, they had the right to employ the defendants to sell it for them. The defendants, by such employment, became in nowise privy to the contract between the plaintiffs and other companies. Their undertaking to sell the salt for the plaintiffs upon commission was upon a new and distinct consideration, having no actual or necessary connection with such original

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contract. They are not therefore in a position to question the plaintiffs' title to the salt. The second objection is also untenable. It was entirely competent for the plaintiffs to impose upon their agents in Oswego such restrictions as they might deem necessary, to restrain them from interfering with their agencies in other parts of the country. And if those restrictions could be deemed in restraint of trade, and therefore not binding upon the defendants, I cannot conceive how that would give them the right to retain money in their hands which it is conceded belongs to the plaintiffs, and which they had collected as the agents of the plaintiffs.

I think the judgment should be affirmed, with costs.

[ONONDAGA GENERAL TERM, July 5, 1859. *Pratt, Bacon, W. F. Allen and Mullin, Justices.*]

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HENDERSON & KENNEDY vs. MARVIN.

If a surety is to be held upon his contract, that contract must remain unchanged, unless by his consent; and he must be held according to the tenor of the contract, or not at all.

Where M. agreed to guaranty to the plaintiffs the payment of the price of goods to be sold to a third person, prior to January 1, 1857, to the amount of \$500, *on a credit of six months*, and after the sales of the goods and their delivery, the plaintiffs *extended* the term of credit, as to a part of the amount, and *shortened* the term as to a part of the amount, by taking the third party's promissory notes therefor, having different periods of time to run; Held that the guarantor was discharged.

APPEAL from a judgment entered on the report of a referee. The action was brought upon an agreement dated November 22, 1855, by which the defendant agreed to pay the amount of goods not exceeding \$500, sold on six months' credit, by the plaintiffs, to Pierce & Champlin of Buffalo, on or before December 31, 1856, and remaining on January 1st, 1857, unpaid. Under and in pursuance of the agreement, the

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plaintiffs sold to Pierce & Champlin goods as follows, viz : In November, 1855, \$519.10 ; December, 1855, \$444.98 ; January, 1856, \$204.45 ; March, 1856, \$112.15 ; April 3d, 1856, \$110.65 ; April 16th, 1856, \$27.55. Payments were made as follows, viz : 1856, February 25th, \$74.14. 1856, April 25th, goods returned, \$347.16. On the 25th of February, 1856, Pierce & Champlin gave to the plaintiff two notes, dated December 1st, 1855, one for \$500 at six months, and one for \$595 at seven months, and on the 15th day of May, 1856, these two notes were returned to Pierce & Champlin, who gave in their place a note for \$1095, dated on that day and payable one day after date. On the 17th day of May, 1856, the plaintiffs commenced an action against Pierce & Champlin, on the last mentioned note, and on the 5th of June recovered judgment, by the confession of Pierce, for \$982.83 damages and costs, against him personally and as a partner. An execution was issued upon the judgment and \$185.12 was made thereunder. Champlin was afterwards sued and judgment had against him personally and as a partner, for the amount then due. The referee found that the goods were sold on the terms of credit required by the contract, and that the defendant was liable, unless released by subsequent acts of the plaintiffs. And holding that a subsequent extension of the time of credit would release the defendant, and that a subsequent shortening of time would not, the referee found that the credit of \$74.14 was applicable to the first sale, thereby reducing the November sales to \$445.57, the time of credit of which amount was extended by the \$500 note ; leaving the balance of the note, viz. \$55.43, to apply on the December sales, and therefore not extending the time of credit of that amount of those sales. And also that the amount of \$347.16 for goods returned, was first applied to pay for the purchases after the giving of the two notes, and the excess was applied upon the notes ; leaving the time of credit of the December sales (with the exception of the \$55.43 extended, and that of the January sales) not extended by the note of \$595. The January sales, \$204.45, and the

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December sales covered by the \$500 note, (\$55.43,) and the interest, amounted to \$296.44; which amount the referee reported to be due to the plaintiffs.

By the Court, GOULD, J. In this case I do not perceive that there is any controversy about the facts. The defendant agreed to guaranty to the plaintiffs and their assignor the amount of their claims against a third party for goods that, prior to January 1st, 1857, they might sell to such third party, *on a credit of six months*; the guaranty not to cover a sum greater than \$500. Certain goods were sold on the credit agreed, enough to bring the defendant's liability up to his guaranty of \$500. But, (as the referee finds, and as there is no dispute,) after the original sales of these goods, and their delivery, the plaintiffs *extended* the term of credit on a part, and *shortened* the term of credit on a part, by taking the third party's promissory notes therefor, having different periods of time to run. The referee found, as matter of law, that as to those goods for which the credit was *extended*, the surety was not liable; and did not include the amount of those in his report; and from that part of his decision there is no appeal. He, however, found that *shortening* the term of credit did *not* discharge the surety; and for the value of the goods, the credit for which had been shortened, he found for the plaintiffs; and the defendant appeals from that part of his report, and from the judgment entered thereon. And the single point submitted to us is, the correctness or incorrectness of the conclusion of law, on the part of the referee.

It being, as it is, conceded that an original sale, on any term of credit other than one of six months—whether it varied from that term two days, or two months—would not bind the surety, (6 *Hill*, 540; 2 *Comst.* 185,) I must confess I do not see how it alters the law of the case, that the abridging of the term of credit was made *after* the sale. The main point—the *actual shortening of the credit*—was accomplished; and its effect on the term of credit was just the same as if the

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original credit had been given for the shorter period. The *real credit* was not for six months. In 6 *Hill*, 542, the phrase is, "he must agree to wait, *so that he cannot sue in the mean time.*" And can he not "sue in the mean time," when having first agreed to wait the full term, he and his principal debtor afterwards (and before the expiring of that term) agree that the term may be so shortened that he *can* "sue in the mean time?" The *second* agreement as to credit *abrogates* the first; and thenceforth *the credit is* for the newly agreed term: and on *that*, there can be no pretense that the surety is held.

In the case before us, not only *could* the creditor sue *within* the original time of the credit, but he actually *did so*. And it would seem a little difficult, after that, to hold the party who was surety for a credit of six months, and for no longer or shorter term. To hold any other rule, were to place the surety entirely at the mercy of the creditor and a principal who saw fit to help the creditor rather than his surety; if not at the mercy of the creditor alone; since the latter, by a variety of inducements, (as to other sales,) might overbear the wishes and intentions of the principal. And since, if the term of credit could be shortened at all, without releasing the surety, it would be immaterial how much it was shortened, or *when* the shortening process was effected. A party might one day sell on the stipulated credit of months, and the *next day* abridge the term to days. In short, there is no safety in attempting to vary the rule from its strictness. We must insist that, if a surety is to be held *upon his contract*, that contract, (whatever may be done with any *collateral* matters, and many such are noted in the books,) that contract must remain *unchanged*, unless by his consent; and he must be held *according to the tenor* of that contract, or not at all.

The judgment should be reversed and a new trial had.

[ALBANY GENERAL TERM, December 5, 1859. *W. B. Wright, Gould and Hogeboom*, Justices.]

COMSTOCK and others vs. WHITE and MOORE.

The plaintiffs and defendants entered into a partnership for the manufacture and sale of a certain medicine, by a written agreement, which provided that the partnership should continue ten years, unless the plaintiffs desired to terminate it sooner; which they were permitted to do, by a notice for that purpose; and that on a dissolution the recipe for making the medicine should be sold at public auction to the highest bidder of the parties. On the 5th of March, 1859, the plaintiffs gave the defendants notice that the firm was dissolved, and that the recipe, trade-mark, &c. would be sold at public auction, by B., an auctioneer, at the Merchants' Exchange, on the 8th of March. On that day the property was sold, and was struck off to the plaintiffs, who bid \$100 therefor. One of the defendants was present, but declined bidding, and refused to concur in the sale. *Held* that the partnership agreement contemplated a friendly dissolution, and a sale at auction of the trade-mark, &c. by mutual consent, and that the parties should bid therefor among themselves. But that no authority was given to either party to fix the time or place of sale, or to select an agent to make it; and that the plaintiffs obtained no title under the sale made by their own auctioneer, without the concurrence of the defendants.

Held also, that in case either party refused to unite in a friendly sale at auction, it was competent for a court of equity to enforce a performance of that clause in the contract, and compel a sale.

And, the necessary facts being alleged, to enable the court to afford the proper relief by directing a sale of the interests at auction, by a referee appointed by the court for that purpose, the complaint was ordered to be amended by inserting the proper demand for such relief. And in case of the plaintiffs' declining so to amend, leave was given to the defendants to amend their answer by demanding such relief by way of counter-claim.

MOTION to dismiss the complaint. The facts appear in the opinion of the court.

LEONARD, J. The plaintiffs and the defendant White became partners in the manufacture and sale of a certain medicine known as Dr. Morse's Indian Root Pills, in 1855, under a written agreement, providing that the partnership business was limited to the making and vending of those pills, and was to continue ten years, unless the plaintiffs desired to terminate it sooner; which they were permitted to do by a notice for that purpose. On dissolution the recipe for making the pills, the trade-mark, &c. "shall be sold at public auction to the

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highest bidder of the parties hereto." The plaintiffs gave the defendant White written notice that the firm was dissolved, on the 5th March, 1859, and also notified him that the recipe, trade-mark, &c., would be sold at public auction by Mr. Bleecker, an auctioneer, on the 8th day of March, 1859, at 12 o'clock M., at the Merchants' Exchange. On the day mentioned the sale was made according to the notification, and the plaintiffs bid therefor \$100, and the interests so sold were struck off to them, as the highest bidder; the defendant White being present and invited by the auctioneer to bid, but wholly declining to do so, and refusing to concur in the sale. White and Moore have disregarded the claim of the plaintiffs to be considered sole owners and purchasers, by virtue of said sale, and have continued to manufacture the same pills, and use the same trade-mark which was before used by the partnership only.

The plaintiffs commence this action claiming to be sole owners of the trade-mark and recipe, by title derived by them under the said sale of March 8th, 1859; and have obtained an injunction against the defendants restraining the use of the said rights, and the plaintiffs demand a decree that the defendants be perpetually restrained. A motion is now made to dismiss the complaint, among other reasons, on account of the want of title in the plaintiffs to the trade-mark, &c. derived under the sale of March 8th, 1859.

This objection is well taken, in my opinion. The partnership agreement contemplates a friendly dissolution, and a sale at auction of the trade-mark, &c. by mutual consent, and that the parties should bid therefor among themselves. Had the sale been so made, the purchaser would have acquired a good title. But no authority is given to either party to the agreement to fix the time or place of sale, or to select an agent to make it. Should either party, as in the present instance, refuse to unite in a friendly sale at auction, it is competent for a court of equity to enforce a performance of this clause in the contract and compel a sale. The clause is not made inopera-

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tive by the want of consent of some party to join in such sale. One party to this agreement, however, cannot employ an auctioneer to sell the trade-mark, &c. which belongs to him and to others, who dissent from the employment of such auctioneer. The auctioneer is the agent of those who employ him to make the sale.

In this case the plaintiffs employ the auctioneer, and are themselves the only bidders; the interests pretended to be sold are struck down to them for \$100, but no money was in fact paid. If it had been paid, the plaintiffs would have paid the money to their own agent, the auctioneer, and have received it back from him. Does the auctioneer in such case make a good title to the plaintiffs of the defendants' interest in the trade-mark? The plaintiffs might themselves have acted as auctioneers, and sold to themselves, and executed a bill of sale from themselves as auctioneers to themselves as purchasers, with the same propriety that they can claim that an auctioneer or agent selected by themselves only, can make a good title to them of another's rights or interests. It is simply a sale from or by themselves to themselves, or by their own authority. The complaint cannot be maintained, on the present claim of title in the plaintiffs.

All the necessary facts are alleged, however, to enable the court to afford the proper relief by directing a sale at auction by a referee appointed by the court for that purpose, at which the parties shall be notified to attend, and who only shall be bidders, and that a conveyance of the interests in question be made by such referee to the highest bidder therefor of the parties to the contract. And that the purchaser shall have the exclusive right and benefit of such interests, and that the other party be restrained from any use or interference therewith.

The complaint should be amended by inserting the proper demand for such relief; and if the plaintiffs decline so to amend within ten days, then the defendants may amend their answer by demanding such relief by counter-claim within ten days thereafter

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Either party may also demand a settlement of all questions arising under the partnership agreement and business, including an accounting, &c.

Should neither party amend, as directed, the complaint is to be dismissed.

When the pleadings are amended, the trial will proceed before the same judge, to final judgment in the action.

The defendant Moore shows, as the case now stands, no right in any of the matters or interests from the use of which he is now restrained.

These amendments are to be made without prejudice to the injunction order, as no title to the trade-mark, &c. was derived by Moore under the agreement of December 22, 1858, or the proceedings of January 1, 1859.

The referee is to be appointed as soon as the amendments of the pleadings are made, and the sale is to be made within ten days thereafter. The amount realized at the sale is to be paid into court, or secured by the purchaser by bond with two sureties, to be approved by the court; the application of the proceeds of the sale to be made on an adjustment of the equities between the parties.

[NEW YORK SPECIAL TERM, March 22, 1860. *Leonard*, Justice.]

ROGERS and wife *vs.* McLEAN and others.

Where partition is sought by action, the court must in some regular way have acquired jurisdiction of the party to be affected by the judgment, as well as of the subject matter of the action; and if that jurisdiction of the person has not been acquired, the judgment is, to this extent, a nullity, and the title to be acquired under it defective.

In order to a voluntary appearance which will give the court jurisdiction of the person, there must be action by the party himself, or by some one authorized by law to speak and act for him.

Where, in a partition suit, one of the defendants was an idiot infant, and there was no attempt made to serve a summons on him, or upon any person

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representing him, and no notice was taken, in the complaint, of his disability, and a guardian *ad litem* for him was appointed upon the petition of a resident of Ohio, claiming to act under an appointment of "the court of probate" of Warren county, Ohio, as guardian for the idiot infant; the idiot not being personally within the jurisdiction of the court, and not being proceeded against by publication of a summons, which would have given the court a statutory jurisdiction; *Held* that the Ohio guardian could not by his act and petition give the court jurisdiction of the idiot's real property situated within this state; that such guardian had no rights or authority, within this state, in respect to the idiot's person or property; and that consequently a judgment in the suit, against the idiot, was a nullity, and his estate was not divested by a sale under such judgment.

A guardian of an idiot, appointed in another state, is but the guardian of the person and estate of the idiot within that state. His appointment has no extra territorial force, and gives him no power over the estate of the idiot within this state.

In this country the rights and powers of guardians are considered as strictly local, and not as entitling them to exercise any authority over the person or personal property of their wards in other states; upon the same general reasoning and policy which has circumscribed the rights and authority of executors and administrators. *Per ALLEN, J.*

Neither are the rights of foreign guardians over immovable property situated in this state, admitted here.

UPON a sale of certain premises in the city of New York, under a judgment in partition in this action, one Joseph Richardson became the purchaser at the price of \$80,250, and paid the ten per cent of the purchase money, and signed the usual purchaser's agreement at the foot of the "terms of sale," agreeing to pay the residue of the purchase money and take the title at the time specified in the agreement. He now asks to be released and discharged from his contract, and that he be restored to all that he has lost by reason of his purchase, upon the ground that the title to the premises under the judgment and the sale therein, is not such as he is entitled to demand, or bound to accept.

M. S. Bidwell, for the petitioner.

C. W. Sandford, contra.

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ALLEN, J. The court has jurisdiction, and will interfere in a summary manner, at the instance of third persons, to protect them against an abuse of power, sought to be exercised by an officer of the court, under pretense of an authority derived from it. (*In re Merritt*, 5 Paige, 125. *Merritt v. Lyon*, 16 Wend. 405.) And a petition is the proper mode for seeking relief from a contract, entered into upon the faith of a judgment of the court, when the party will not acquire under the judgment a perfect title to that for which he contracts. (*Darwin v. Hatfield*, Seld. Notes, 1852, p. 36.) Indeed, no objection is taken to the form of the proceeding, or to the proposition that a purchaser at a judicial sale cannot be compelled to accept a defective or doubtful title. It is claimed that the premises were sold at the risk of the purchaser. It was important, with a view to obtain a fair price for the property, that bidders should understand that if they paid a fair price for the property, the same being sold without reserve, they would be protected by the court, and not compelled to take an incumbered or worthless title. This is the well established rule in mortgage and partition sales in equity, and applies to like sales under the judgments of this court. "If there is any cloud upon the title, or incumbrance upon the land, or difficulty in obtaining possession, the property should be sold at the risk of the purchaser in that respect, and in the amounts bid, there would then be a reasonable allowance for such risk." (*McGown v. Wilkins*, 1 Paige, 120.) A purchaser who is not notified of risk in the title, will not be compelled to take it, unless he can get a legal and equitable estate. (*Coster v. Clarke*, 3 Edw. Ch. 428.)

The same principle is applied to sales by assignees in bankruptcy, who, if they give no notice of any defect in their title, or do not put bidders on their guard, by giving notice that they will sell only such title as they have, are bound to make a good title. (*McDonald v. Hanson*, 12 Ves. 277. *Jervois v. Duke of Northumberland*, Jac. & W. 549. 2 P. Wms. 198. 3 Mer. 53.) If there be any real doubt as to

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the title which the purchaser will obtain under a sale in partition, *e. g.*, when the purchaser has reason to suppose that there is an outstanding life estate, by reason of the alleged coverture of the complainant at the time of the commencement of the suit, the purchaser will be discharged. (*Spring v. Sandford*, 7 Paige, 550.) So where an infant was made a defendant in a partition suit, but no guardian *ad litem* was appointed, or order for appearance entered, nor the bill taken as confessed against him, a purchaser under the decree was discharged from his bid, notwithstanding the infant, having obtained his majority, offered to release his interest; the decree being so far irregular that it could not be enrolled. (*Kohler v. Kohler*, 2 Edw. Ch. 69.) The enrollment was necessary to give a good title as to the other parties to the suit.

The reasons of the rule are obvious, and are such as require that it should be strictly adhered to. It is necessary, 1st, to secure to the parties in interest a fair price for property sold under the decree of the court; and 2d, to protect the purchaser, who pays a fair price for property so sold, without notice of any defect in the title.

If the purchaser was understood to buy at his own risk, it is quite evident that a greatly diminished price would be the result; and as the purchaser must take a title without covenants of warranty of any kind, he can only be protected from loss by reason of a defective title, by being excused from accepting any but a good title.

If, then, the conveyance to the petitioner as the purchaser, under the judgment in this action, would not give him a perfect title to the premises, he should be discharged from his bid; and if there is any estate or interest in the premises, which will not pass by the deed to be executed by the referee, then the title is defective.

Under the statute, partition may be had against unknown owners, the proceedings being to this extent treated as *in rem*; but when partition is sought by bill in equity, or by an action, which has taken the place of a bill in equity, no one

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is concluded or in any way affected by the proceedings and judgment, who is not made a party to the action, not nominally but really, by the service of process, or some of the ways known to the law, as by a voluntary appearance in the action. In other words, the court must in some regular way have acquired jurisdiction of the person of the party to be affected by the judgment, as well as the subject matter of the action; and if that jurisdiction of the person has not been acquired, the judgment is, to this extent, a nullity, and the title to be acquired under it defective. (*Coster v. Clarke*; *Darwin v. Hatfield*; *Spring v. Sandford, supra.*)

Serious questions are made in respect of the appearance of, and consequent jurisdiction over, several individuals, who are nominal parties to the record, and necessary parties to the action; but without passing upon all the objections taken, the objection that Samuel Mitchell, who is represented to be an "infant and idiot, of about twenty years of age," was not a party to the action, appears to be insuperable. It is conceded that Mitchell was one of the heirs at law of Samuel S. Eagle, and as such entitled to an undivided twentieth part of the premises Eagle died seised of, as is claimed by their seeking to uphold the proceedings and sale. Jurisdiction may be acquired by the service of the summons or the voluntary appearance of the defendant. (*Code*, § 139.) But an idiot has no will, and is not competent to appear in person or by attorney; and if the action be against a person judicially declared to be of unsound mind, or incapable of conducting his own affairs in consequence of habitual drunkenness, and for whom a committee has been appointed, the summons must be served by delivering a copy thereof to such committee, and to the defendant personally. (*Code*, § 134.) A service is not good which is not upon the defendant himself. (*Heller v. Heller*, 6 How. 194.) A guardian *ad litem* will not be appointed on the application of a relation of the lunatic, when the summons has not been served on the lunatic.

There was no attempt to serve a summons in this action

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upon Mitchell, or upon any person representing him. It does not appear, but was assumed, that he was a non-resident of the state, and a resident of the state of Ohio. No notice is taken, in the complaint, of his disability. There was no evidence of his idiocy or infancy, except as contained in the petition for the appointment of a guardian *ad litem*; and if the court had jurisdiction over his person, perhaps that would be sufficient. It may be conceded, as it has been decided, that an infant over fourteen years of age may voluntarily appear, and that such appearance is effectual for all purposes as a like appearance by an adult; but it must be on his own application for the appointment of a guardian. (*Code*, § 116. *Varian v. Stevens*, 2 *Duer*, 635.) Whether the court could thus assume jurisdiction over a non-resident infant under fourteen years of age, upon the application of a relation or friend, and without notice to any person, may be more questionable, but need not be decided. (*Code*, § 116, *subd.* 2.)

It may also be assumed, for all the purposes of this motion, (without deciding,) that a committee of a lunatic infant, residing within this state and appointed by the courts of this state, may without the service of a summons upon the lunatic cause an appearance to be entered and a guardian appointed for him, which is at least doubtful. (*See Heller v. Heller*, *sup.*) The difficulties of this case would not be overcome if this was so decided. In order to a voluntary appearance, there must be action by the party himself or by some one authorized by law to speak and act for him; and the difficulty in this case is that the party did not and could not act for himself, and there was no one competent to act for him. The guardian for the "idiot infant" was appointed upon the petition of a resident of Ohio, claiming to act under an appointment of "the court of probate" of Warren county, Ohio, as "guardian for Samuel Mitchell, an idiotic person aged about 20 years, of Warren county, Ohio." What the powers and duties of a guardian thus appointed are in the state of Ohio is not known to me, but at the most he was but the guardian of the person and estate

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of the idiot within the state of Ohio. His appointment had no extra territorial force, and gave him no power over the estates of the idiot within this state, and had the domicile of the idiot been changed from Ohio to this state, the guardianship of the person appointed in the state of Ohio would not have been recognized here. Courts in this state do not take notice of letters testamentary or letters of administration granted abroad or out of the state. And a person appointed guardian to an infant in another state is not entitled to receive from the administrator here, the legacy or portion of the infant. (*Morrell v. Dickey*, 1 *John. Ch.* 153.) One appointed executor in another state, and acting in this, will be regarded as an executor *de son tort*. (*Campbell v. Tousey*, 7 *Cowen*, 64.) No notice is taken of letters of administration granted abroad. (*Robinson v. Crandall*, 9 *Wend.* 425; and see *Williams v. Storrs*, 6 *John. Ch.* 353.) Whether the guardianship in Ohio extended to the estate, or was confined to the person of the idiot, does not appear. Whatever difference of opinion there may be among foreign jurists as to the extra territorial authority of guardians respecting the persons or property of their wards, in America the rights and powers of guardians are considered as strictly local, and not as entitling them to exercise any authority over the person or personal property of their wards in other states, upon the same general reasoning and policy which has circumscribed the rights and authority of executors and administrators. (*Story's Conf. of Laws*, 1st ed. § 499. *Kraft v. Vickery*, 4 *Gill & John.* 332.) In regard to immovable property, there is no diversity of opinion, and according to the rules of the common law, as well as by the general consent of foreign jurists, the rights of foreign guardians are not admitted over immovable property situated in other countries. Judge Story says, "No one has ever supposed that a guardian, appointed in any one state of the union, had any right to receive the profits, or to assume the possession of the real estate of his ward, in any other state, without having received a due appointment from the proper tribunals of the

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state where it is situate." (*Story's Conf. of Laws*, 1st ed. § 504.) There is no principle within which the Ohio guardian could, by his act and petition made and verified in or out of this state, give the court jurisdiction of his real property situated within this state. Mitchell, the ward, was not personally within the jurisdiction of the court; he did not and could not voluntarily submit himself to its jurisdiction; he was not proceeded against by publication of a summons, which would have given the court a statutory jurisdiction; the guardian had no rights or authority, within this state, in respect of his person or property, and it necessarily follows that the judgment, as to him, is a nullity; and his estate is not divested by the sale under the judgment.

The authorities referred to by the counsel for the parties to the action opposing the motion, relate to the procedure for the appointment of the guardian, assuming that the court has acquired jurisdiction over the person of the infant or other party incapable by himself of defending the action. (*Story's Eq. Pr.* § 70. 1 *Dan. Pr.* 202. 1 *Barb. Ch. Pr.* 86. *Mix v. Mix*, 4 *John. Ch.* 108. *Heller v. Heller*, *supra*.) They prescribe how a person under disability, being made a party to a suit, may defend and in what way, and upon whose application a guardian *ad litem* may be appointed, not how he may become a party without process.

If the guardian *ad litem* in a partition suit must be appointed in pursuance of the statutes regulating partition proceedings, rather than under the code, as has been held, the result will not be different; for there is no pretense that the directions of these statutes have been complied with. (2 *R. S.* 317, § 2. *Id.* 329, § 80 as amended in 1830. *Laws of* 1853, p. 311, § 1. *Varian v. Stevens*, 2 *Duer*, 635. *Lyle v. Smith*, 13 *How.* 104.)

The title, then, is not such a title as the purchaser can be required to accept, and he must be discharged from his bid. This defect cannot be cured, except by a new action. The purchaser is entitled to a return of the ten per cent paid upon

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the purchase, and to be paid out of the rents and profits of the estate now in the hands of the receiver, interest upon that sum from the time the sale was to be completed and the conveyance executed. He is also entitled to be paid out of the same fund the expenses incurred in investigating the title, and the costs of this motion. (*Kohler v. Kohler, supra.*) These costs and expenses are fixed at \$150.

[AT CHAMBERS, New York, April 2, 1860. *Allen*, Justice.]

DOOLITTLE vs. DOOLITTLE and others.

Two trustees of a common school district may issue a warrant for the collection of a tax; and the presence of the third trustee at the issuing thereof will be presumed, until the contrary is shown.

The tax list itself need not be signed by the trustees. The signing of the warrant to which the tax list is annexed is sufficient.

A tax warrant, valid on its face, issued by the trustees of a school district in pursuance of a previous order of the board of supervisors, will justify the collector in taking property thereon, even though such order was void.

And being a protection to the officer, it will also protect those who aid him in taking the property.

A PPEAL from a judgment of a justice of the peace against the defendants for \$1.75 damages, and \$4.59 costs; which judgment the defendants paid. The action was for trespass in taking the plaintiff's cow. The defendants justified the taking, under and by virtue of a warrant for the collection of a school tax, signed by two of the trustees of a school district. The warrant was issued in pursuance of an order made by the board of supervisors of Broome county, under the act of May 1, 1847, in relation to suits against district school officers. (*Laws of 1847, p. 163.*) The county judge being incapable of acting in the cause, the action was transferred by the county court to this court, pursuant to subdivision 13 of section 30 of the code.

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F. G. Wheeler, for the plaintiff.

Northrup & Richards, for the defendants.

BALCOM, J. The justice erred in rejecting the tax list and warrant offered by the defendants. The same were regular on their face. The presumption, without proof, is that the tax list and warrant were made out when all the trustees were present, though signed by but two of them. In *McCoy v. Curtice*, (9 *Wend.* 17,) it was decided that two trustees may issue a warrant for the collection of a tax, and the presence of the third trustee at the issuing thereof will be presumed, until the contrary be shown. This principle is too well settled to be questioned. (See 3 *Denio*, 249; *Id.* 594; 1 *Comst.* 79.) The statute is that "the warrant issued and annexed to any tax list or rate bill, shall be under the hands of the trustees of the district, or a majority of them." (1 *R. S.* 4th ed. 903, § 144.) The tax list itself need not be signed by the trustees. The signing of the warrant, to which the tax list is annexed, is sufficient. The warrant offered in evidence by the defendants in this case was therefore valid on its face. And being valid on its face, it justified the collector in taking the plaintiff's cow, even if the order made by the board of supervisors was void. This principle is clearly established. (See *Alexander v. Hoyt*, 7 *Wend.* 89; *Abbott v. Yost*, 2 *Denio*, 86.) As the warrant was a justification for the collector who took the cow, by virtue thereof, it protected those who aided him in taking her. It seems that the collector needed assistance, for German Doolittle tried to prevent him taking the cow. Chief Justice Savage said, in *Elder v. Morrison*, (10 *Wend.* 128,) that "whenever a sheriff or constable has power to execute process in a particular manner, his authority is a justification to himself and all who come in his aid." (10 *Wend.* 138. 1 *Cowen's Tr.* 2d ed. 514 and 515.) The rule is general, and rests on principle, that process, which justifies an officer in taking property, protects all who aid him in taking

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the same. For the foregoing reasons the judgment of the justice, in the action, should be reversed with costs; and, as the defendants paid the judgment, they are entitled to restitution.

Decision accordingly.

[BROOME SPECIAL TERM, April 17, 1860. *Balcom*, Justice.]

ROBERT GOELET and PETER GOELET *vs.* OTTAVIANO GORI
and CATHARINE GORI.

THE SAME *vs.* THE SAME.

Where a lease for a term of years is executed to husband and wife, jointly, the rights and interests of the lessees, respectively, by and under the lease, and in and over the demised premises, are what they are declared to be by the common law, and are unaffected by the acts of 1848 and 1849, for the more effectual protection of the property of married women.

Those acts were not intended to enable married women to take and hold property *jointly* with their husbands, but to take and hold and dispose of property as if they had no husbands.

In case of a joint lease to husband and wife, the wife will not be deemed to have intended to charge her separate estate, by the covenant for payment of rent.

At law, and *if seems*, in equity, the covenant to pay the rent, at least during the life of the husband, is to be deemed the sole covenant of the husband; and the rent due and unpaid will be considered the debt of the husband, only.

Where a plaintiff is entitled to the relief asked for, as against the property of a married woman, it is proper to make her husband a party defendant, with her. And if he is so joined, he cannot demur separately to the complaint on the ground that it contains no cause of action against him.

DEMURRERS to complaints. The complaint in the first action alleged that on the 16th of April, 1858, by indenture of lease, of that date, between the plaintiffs of the first part, and the defendants of the second part, under seal, the plaintiffs did grant, demise and to farm let to the defendants, and the defendants did take and lease of and from the plaintiffs cer-

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tain premises therein described, situate in the 18th ward of the city of New York, from the first day of May, 1858, for the term of five years, at the yearly rent of \$3500 and the taxes. The said sum of \$3500 payable in equal quarter ~~yearly~~ payments on the first day of each of the months of August, November, February and May. Which rent and taxes the defendants jointly and severally covenanted and agreed to pay, to wit, the said sum of \$3500 at the times and in the manner above specified, and the said taxes as they should become due and payable. The complaint further alleged that the said Catharine Gori, at the making and execution of the said indenture of lease, was, and still is, the wife of the said Ottaviano Gori; that at the time of executing the lease she had, and still has, separate property and estate in her own sole right, viz. certain lots situate in the city of New York, particularly described. That on the said first day of May, 1858, the plaintiffs suffered and permitted the defendants to enter upon the said demised premises; who thereupon did, as well the said Catharine to her several use and benefit, as the said Ottaviano to his several use and benefit, under and in virtue of said lease, enter into and have ever since remained in the peaceable possession, occupation and enjoyment thereof. That as well the sum of \$513.90, being part and portion of the quarter's rent for the demised premises which became due and payable on the first day of May, 1859, as the further sum of \$875, being the entire quarter's rent of the premises which became due and payable on the 1st of August, 1859, have not been paid to the plaintiffs by the defendants, or either of them, and that the said several sums of money, together amounting to \$1388.90, with interest from the 8th day of August, 1859, still remain due and owing from the defendants to the plaintiffs, in virtue of the lease and the common occupation of the demised premises thereunder by the defendants, each to his or her several use, benefit and behoof as aforesaid. Wherefore the plaintiffs demanded judgment against the defendant Ottaviano Gori for the said sum of \$1388.90, with interest from

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the 8th day of August, 1859, and the costs. And for a further judgment that the said sum of \$1388.90, and interest and costs, be made and satisfied out of the separate estate whereof the said Catharine Gori is seised and possessed as aforesaid; and to that end, that the same, or so much thereof as would pay the said sum of money, with interest and costs, be sold, by and under the direction of the court; and for general relief.

To this complaint the defendants demurred separately, on the grounds that it appeared on the face of the complaint, 1st. That there was a defect of parties defendant. 2d. That several causes of action had been improperly joined. 3d. That the complaint did not state facts sufficient to constitute a cause of action against the defendants.

The second suit was for rent upon the same lease. The complaint differed from that in the first suit, in three particulars: (1.) It alleged that by her covenant in the lease, Mrs. Gori did intend and undertake, and did appropriate and appoint to and charge with the payment of the rent and taxes, her separate estate. (2.) That she had enjoyed the whole of the demised premises to her sole, separate and several use and benefit. (3.) No relief was asked against Ottaviano Gori, the husband.

The defendants also demurred separately to this complaint; assigning the same causes of demurrer as in the first suit.

C. J. and E. De Witt, for the plaintiffs.

S. W. and R. B. Roosevelt, for the defendants.

SUTHERLAND, J. By the act of 1848, for the more effectual protection of the property of married women, as amended by the act of 1849, "any married female may take by inheritance, or by gift, grant, devise or bequest, from any person other than her husband, and hold to her sole and separate use, and convey and devise real and personal property, and any

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interest or estate therein, and the rents, issues and profits thereof, in the same manner and with the like effect, as if she were unmarried, and the same shall not be subject to the disposal of her husband, nor be liable for his debts."

If the lease mentioned in the complaints in these actions, which was executed by the plaintiffs to the defendants, husband and wife, for the term of five years, had been executed to the wife alone, it may be conceded that such term or leasehold interest, under the protection of the statute, might have been held by her to her sole and separate use, free from the control, disposition, or debts of her husband; but notwithstanding this statute, her covenant to pay the rent, reserved in such lease, would have been absolutely void at law; and I am not prepared to say, that the execution of such covenant would have been, in equity, held sufficient evidence of an intention on her part to charge with the payment of the rent, real estate of hers, held by her at the time to her separate use, other than the demised premises. (*See Darby v. Callaghan*, 16 N. Y. Rep. 71; *Yale v. Dederer*, 18 *id.* 265.)

It appears, however, from the complaints in these actions, that the lease was not executed by the plaintiffs to the wife alone, but to the defendants as husband and wife, and that they, in and by the lease, jointly and severally covenanted to pay the yearly rent of \$3500, reserved in the lease, quarterly.

The complaint in the first action asks for judgment against the husband for the amount of rent alleged to be due and unpaid, with costs. The complaint in the second action asks for no relief as against the husband; but the complaints in both actions severally ask judgment as against the wife, that a certain amount of rent alleged to be due and unpaid, with the plaintiffs' costs of the action, be made and satisfied out of certain real estate of the wife, described in the complaints, other than the demised premises, alleged to have been the separate estate of the wife, at the time of the execution of the lease by the plaintiffs, and at the time of the commencement of the action.

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The complaint in the first action contains no allegations of fact to show that the wife intended by her covenant to pay the rent, to charge her sole and separate real estate with the payment of the rent, or that her sole and separate real estate should be so charged, except the allegations that she jointly and severally covenanted with her husband to pay the rent, and that she had such separate real estate, describing it.

The complaint in the second action contains this additional allegation, (not of a fact, but rather of a conclusion of law,) that by the covenant to pay the rent, "the said Catharine did intend and undertake, and did appropriate and appoint to, and charge with, the payment of the said rent and taxes, her separate estate, at the making and execution of the said lease, as well as at the commencement of this action, consisting of," &c., describing certain real estate.

The complaints allege that the lease was executed on the 16th day of April, 1858. The complaint in the first action alleges that the defendants, on the first of May following, entered under the lease, and had remained in possession under the lease, each to their several use and benefit. The complaint in the second action alleges that the said Catharine entered under the lease on the first day of May, 1858, "and hath ever since remained in the possession, enjoyment and occupation of the same, to her sole, separate and several use and benefit."

The defendants separately demur to the complaints.

Without examining the other grounds of demurrer on the part of the wife, I think the demurrer is well taken in both actions, on the ground that the complaint does not state facts sufficient to constitute a cause of action against her.

As I have before intimated, had the lease been executed to the wife alone, I should not, without a good deal further examination, be prepared to hold, on the allegations contained in either of these complaints, that her separate property sought to be charged, should be charged with the payment of the rent of other premises so demised to her. But as the lease

was in fact to her and her husband, I can see hardly a pretense for so holding.

The lease being to her and her husband, I do not think that the acts of 1848 and 1849, for the more effectual protection of the property of married women, affect the question.

By the very terms of the lease, irrespective of the common law marital rights of the husband to and over the chattels real of which the wife is or may be possessed during the marriage, and of the principle of the common law, that the husband and wife being considered but as one person at law, cannot take or hold either as joint tenants or as tenants in common, the plaintiffs in the lease did not grant or convey to the wife, and she did not and could not take, and had no right to hold the demised premises to her *sole* and *separate* use. Irrespective of the common law principles adverted to, she and her husband by the lease would have taken and held, to and for their *joint* use and benefit. The acts of 1848 and 1849 were not intended to enable married women to take and hold property *jointly* with their husbands, but to take and hold and dispose of property as if they had no husbands.

I do not think that the wife took, or holds, by or under the lease executed to her *and* her husband, any estate or interest, which was or is protected or affected by these statutes.

The allegation under the first complaint, that the wife entered under the lease, and had ever since possessed, occupied and enjoyed, to her *several* use and benefit, as well as the husband to his *several* use and benefit, (an allegation, the meaning of which I do not profess to understand,) and the allegation in the second complaint, that the wife entered under the lease and had ever since occupied and enjoyed to her *sole* use and benefit, have nothing to do with the question. The question is not, which, as between the husband and wife, has in fact entered, or occupied, or enjoyed the demised premises, or the rents, issues or profits thereof, under the lease, but which had and has the right to do so, and has the right absolutely to dispose of the leasehold term, estate or interest. I repeat

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that I think the rights and interests of the husband and wife respectively, by and under the lease, and in and over the demised term and premises, are precisely what they are declared to be by the common law, and were, and are, unaffected by these statutes for the protection of the property of married women.

What then are their respective rights and interests by the common law? If an estate in land be conveyed to the husband and wife, or a joint purchase be made by them during coverture, the common law declares that "they are not properly joint tenants, nor tenants in common, for they are but one person in law, and cannot take by moieties." They are said to be both seised of the entirety; and the survivor takes the whole. "This species of tenancy arises from the unity of husband and wife, and it applies to an estate in fee, for life or for years." (2 *Kent's Com.* 5th ed., 131, 132.) If the estate be a term for years, the husband may alien the entire term or estate, so as to bind the wife and deprive her of her right of survivorship; otherwise, if it is a freehold estate, (2 *Kent's Com.* 132. *Grote v. Locroft*, *Cro. Eliz.* 287. *Jackson v. McConnell*, 19 *Wend.* 175. *Barber v. Harris*, 15 *id.* 615. *Dias & Burn v. Glover*, 1 *Hoffman's Ch. Rep.* 71.) Whether the estate is a term for years or a freehold estate, the husband takes the rents and profits during the joint lives of husband and wife.

It would appear, therefore, that at common law, all the right or interest which the defendant Mrs. Gori took, or has, by or under the lease executed by the plaintiffs, was, and is, a mere right of survivorship in case her husband should die before the expiration of the term, without having disposed of the entire term, and of all the estate and interest granted by the lease.

In view of these rights of the defendants, as husband and wife, and as lessees, by the lease executed by the plaintiffs, thus fixed by the common law; of the husband's absolute right of disposition of the entire term; of his sole right to the rents and

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profits during the entire term, if he survives the term; of the remote probability of the wife's ever having *any* right of sole *possession* and enjoyment, depending not only upon her surviving her husband and the term, but upon the husband's never exercising his absolute right of disposition of the term—what ground is there for holding that the wife, by her covenant to pay the rent, intended to charge her separate estate, or that her covenant or its fulfillment was, or would be, on her own account, or for her own benefit, or for the benefit of her separate estate?

At law, and I think in equity, on the facts stated in the complaints in these actions, the covenant with the plaintiffs to pay the rent, at least during the life of the husband, must be considered as the sole covenant of the husband; and the rent due and unpaid, the payment of which is sought to be enforced by these actions, must be considered as the sole debt of the husband.

The utmost that can be claimed on the part of the plaintiffs is, that the wife by her covenant in effect became surety for her husband.

The allegation in the second complaint, that the wife, by her covenant, "did intend and undertake, and did appropriate and appoint to and charge with the payment of said rent," her separate estate at the time described in the complaint, adds nothing to the equity of the plaintiffs' case. It is only an allegation of a conclusion of law. No other mode, or manner, or instrument of appointment, or charging, than her covenant to pay the rent, is alleged or pretended in the complaint.

That she intended to charge her separate estate is, I think, even disproved by the facts and circumstances of the case.

In any view of these complaints, it appears to me that neither contains any cause of action against the wife, nor any ground for the relief asked, as against her separate property. (*See Yale v. Dederer*, 18 N. Y. Rep. 282, 3; *Gardner v. Gardner*, 22 Wend. 526; 2 Sandf. Ch. Rep. 287; *Goodall*

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v. *McAdam and wife*, 14 *How. Pr. Rep.* 385; *Dunderdale v. Grymes*, 16 *id.* 195.)

The defendant Mrs. Gori must have judgment on her several separate demurrers with costs, with liberty to the plaintiffs to amend their complaints on payment of costs.

The defendant Ottaviano Gori's separate demurrer to the complaint in the first action, I think, should be overruled. He demurs upon the grounds that there is no cause of action stated in the complaint against him; that several causes of action have been improperly united; and that there is a defect of parties defendant. There is a good cause of action stated in the complaint in the first action against him. The complaint alleges his covenant to pay the rent; that the rent is due and unpaid; and asks judgment personally against him for the amount thereof. Having just held that there is no cause of action against the wife, in the complaint, nor *in rem* as against her property, it follows that there is only one cause of action stated in the complaint, and that is the one against him. Besides, I am not prepared to say, that had there been sufficient grounds for equitable relief stated in the complaint as against her property, he could have availed himself of the misjoinder of the actions, by his separate demurrer. Nor do I think that by his separate demurrer he can avail himself of the fact that the complaint contains no cause of action against his wife, or of the fact that she was improperly made a party.

The complaint in the second action asks for no judgment or relief whatever against the defendant Ottaviano Gori. The plaintiffs could not, by default or otherwise, obtain any judgment against him in the second action. On the theory that the plaintiffs were entitled to the equitable relief asked for in the complaint, as against the property of the wife, he was properly made a party. (*Code*, § 114.) Yet he demurs separately to this complaint, upon precisely the same grounds on which he demurred to the complaint in the first action. I do not think he had a right to demur separately to the com-

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plaint, on the ground that it contained no cause of action against him. It does not purport to contain any cause of action against him, but only a cause of action as against his wife and her separate property. He might have joined with his wife in her demurrer, but having demurred separately, I think his demurrer must be overruled. In my opinion, he cannot, by his separate demurrer, avail himself of the fact that the complaint in the second action contains no cause of action, either against him or her, or *in rem*, as against her separate property.

This demurrer to the complaint in the second action must be overruled with costs; but the plaintiffs can have no judgment on the demurrer, except for costs.

The plaintiffs must have judgment, on Ottaviano Gori's demurrer to the complaint in the first action, against him with costs; with liberty for him to amend in twenty days, on payment of costs.

[NEW YORK SPECIAL TERM, April 2, 1860. *Sutherland*, Justice.]

BATTERSHALL *vs.* DAVIS and others.

A subscription for shares of the capital stock of a manufacturing company is a legal obligation, which can be enforced by action, and by forfeiture for non-payment. It is therefore a good consideration for giving a bond and mortgage to secure the payment of the amount subscribed.

And the neglect or omission of the company to issue to the mortgagor scrip for the shares, at his request, will not amount to a failure of the consideration; where it appears that should the officers of the company issue the stock without payment therefor in money, they would make themselves liable for the amount, to the creditors of the company.

A stockholder of a corporation, after having joined in an application made to the court by the receiver, for authority to sell the assets of the corporation, cannot be permitted to question the validity of the receiver's appointment, or of the order directing the sale.

THIS was an action for the foreclosure of a mortgage, and was tried at the circuit, before LEONARD, justice, without a jury; and the following facts were found by him:

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The defendant Alexander Davis subscribed for a large number of shares of stock in the Hydeville Marble Company, and being indebted to the said company thereon, in the sum of \$1675, by arrangement with the said company, executed his bond for that sum, secured by a mortgage from himself and wife, to Peter W. Livingston, then a trustee of the said company, dated March 28, 1857, on the premises described in the complaint, which mortgage was also acknowledged and recorded as stated in the complaint. The bond and mortgage were delivered to the company by Davis, together with his note for \$267.50, on the 1st day of April, 1857, and were by the company received in full payment of all indebtedness. The company also held two notes made by Davis, one for \$451.70, due August 13, 1856, and the other for \$476.28, due September 15, 1856, which the company agreed to surrender to Davis at the time the bond and mortgage and the note for \$267.50 were delivered, as aforesaid. The company, although often requested by Davis, never did surrender the notes to him. At the time the bond and mortgage were so delivered, the said two notes were in the hands of a third party, who had no title to them as against Davis, but who continued to detain them until the trial herein, when they were produced in court by this plaintiff and offered to be surrendered to the defendant Davis. Davis paid his note for \$267.50 at maturity. Livingston, who had advanced nothing on the bond and mortgage to him, and had no interest therein except as a trustee for the company, by assignment under seal dated the 23d day of November, 1857, duly executed and acknowledged, transferred and conveyed the bond and mortgage to the Hydeville Marble Company.

By two orders made in October and November, 1858, in an action instituted in this court by John S. Christie, for the purpose, among other things, of dissolving the said company as an insolvent corporation, Lucien D. Coman was appointed receiver of the assets and property thereof. Another order was made in the said action, in February, 1859, authorizing

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the said receiver to sell the assets and property of the company, and the defendant Alexander Davis united with the receiver in making the application to the court for the said order last mentioned.

The plaintiff was the president of the company at the time the receiver was appointed, and has never since resigned or been removed, but has never since taken any action as president, so far as the evidence shows. The plaintiff was a creditor of the company at the time the receiver was appointed, and previously, in an amount largely exceeding the amount of the said bond and mortgage. The receiver assigned the said bond and mortgage to the plaintiff on the 2d day of April, 1859. The plaintiff paid no new consideration for the bond and mortgage, but received it at the amount due thereon for principal and interest, in part payment of the indebtedness due to him from the company. All the stock for which Davis had subscribed, or to which he was entitled, except 36 shares, was issued to him by the company. The defendant Davis, who was also a trustee of the company, several times asked the company to issue scrip to him for the said 36 shares of stock, after the bond and mortgage had been executed and delivered by him to the company; which request, although never refused, was never actually complied with. The company was organized as a corporation under the act of the legislature of the state of New York passed in 1848, to authorize the formation of corporations for manufacturing, mining, mechanical or chemical purposes, and the certificate for that purpose was filed in the office of the clerk of the city and county of New York, October 6th, 1856. There has been no market value for the stock of this company at any time since the first demand made by Davis for the issue of scrip for the said 36 shares of stock. The par value was \$50 per share. No payments have been made on the bond and mortgage, for principal or interest. The amount of interest now due thereon is the sum of \$358.43, and the whole sum due for principal and interest is \$2033.43.

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A. K. Hadley, for the plaintiff.

William B. Stafford, for the defendants.

LEONARD, J. There are two questions only, in this case, that are entitled to be noticed.

First. Whether a bond and mortgage given to secure the payment of a sum due to a manufacturing company, on a subscription for shares, can be collected after the subscriber has demanded scrip for his shares, and neglect or refusal by the company to issue it.

The subscription for shares is a legal obligation which can be enforced by action, and by forfeiture for non-payment. It is therefore a good consideration for giving the security. If the bond and mortgage were to be declared void, the subscriber would remain liable for his subscription. The receipt given for the bond and mortgage by the company, says that Davis is to be credited for the full amount of it. The mortgage was probably taken as security for the debt due from the mortgagor to the company, and given to obtain indulgence. It makes very little difference to the debtor whether he pays his bond and mortgage, or his debt due for the shares for which he became a subscriber.

The act under which the company was organized, declares that money only shall be taken in payment for shares, prohibits all loans by the company, and declares that all the officers shall be liable for all the debts of the company, to the extent of the loan. The act also directs that all stock must be paid for, half in one, and half in two years. How then could the company have lawfully issued the shares in question? If the officers issued the stock without payment therefor in money, they made themselves liable for the amount. The officers could assent to giving indulgence and take a mortgage to secure the debt, and thereby protect themselves against liability. Were the company in existence, the court might stay the collection of the mortgage until the company should

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issue the stock. I am not able to perceive that the defendant Davis would have any recourse to compel the company to issue scrip till the mortgage or the price of the stock should be paid. If the company, as in this case, should fail before the stock should be paid for, the party who had subscribed for the stock would still be liable to pay, although the stock had become worthless. The bond and mortgage is therefore, I conceive, founded on a valid consideration, and is obligatory upon the maker.

Second. It is alleged by the defendants that the proceedings in the action of Christie against the company, for a dissolution thereof, wherein the receiver was appointed, and was afterwards authorized to sell the assets &c. of the company, was irregular and void, and that the title of the plaintiff to the bond and mortgage in question, is therefore nugatory and worthless.

Questions of irregularity are to be settled in the action wherein they arise, unless questions of jurisdiction are involved.

Davis cannot be permitted to question the appointment of the receiver, or the order directing the sale of the assets, including this mortgage, inasmuch as it appears from the petition of the receiver, upon which the order of sale was granted, that Davis joined in that application as well as several other stockholders and trustees of the company.

It is not necessary to decide whether he could, under other circumstances, successfully dispute the authority of the court to appoint the receiver in this case.

[NEW YORK SPECIAL TERM, April 2, 1860. *Leonard*, Justice.]

GRINNAN *vs.* PLATT & EDWARDS.

The plaintiff remitted to the defendant a draft for \$400, by mail, informing him, at the same time, that he might use it, if he would extend the time for the payment of a certain mortgage for \$8000, which the defendant held, then overdue, for the period of one year. The plaintiff was under no personal liability to pay the mortgage. The defendant kept the draft, but declined to stay proceedings on his mortgage unless he received a further sum of \$1100 on account of the mortgage, within fifteen days. *Held* that the plaintiff had a right to impose any condition upon the application or use of the money by the defendant; and that the latter could make no application or use of the money while disregarding the condition. That he must return the money, or else he held to have accepted the condition.

Held also, that the plaintiff was not to be driven to his remedy at law, but was entitled to an injunction to restrain the prosecution of a foreclosure suit.

DEMURRER to complaint. The action was brought to restrain the prosecution of a foreclosure suit.

John Slosson, for the defendants.

P. T. Woodbury, for the plaintiff.

LEONARD, J. The plaintiff remitted from Virginia to the defendant Edwards, at Newburgh, a sight draft for \$400, informing him by the same letter which enclosed the draft, that he might use it if he would extend the time for the payment of a certain mortgage for \$8000 which he held, then overdue, for the period of one year. Edwards by letter acknowledged the receipt of the draft, stated that he should present it the next day for payment, but declined to stay proceedings on his mortgage unless he received a further sum of \$1100 on account of the mortgage, within fifteen days. The plaintiff purchased a moiety of the land covered by this mortgage, from the mortgagor, and held the other moiety thereof under an assignment from the mortgagor for the benefit of his creditors. He was under no personal liability to pay the mortgage. The plaintiff has obtained an injunction against any proceeding to foreclose the mortgage. Platt is made a party because the

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premises in question were conveyed to him by the debtor in trust to secure the debt due Edwards, with authority to sell the land on default in payment of the said debt at maturity. This trust conveyance is designated herein as a mortgage, according to its legal effect.

While it is true that no contract has been entered into between the plaintiff and the defendant Edwards, for an extension of time, it is equally true that the plaintiff imposed a condition upon the defendant before he had the right to use the money sent him. The plaintiff was under no liability to Edwards, in respect to the money: it was his own, and he had the right to impose any condition upon the application or use of it. Edwards could make no application or use of the money, rightfully, while he disregarded the condition. He must return the money he so received, or else be held to have accepted the condition. Had any legal obligation rested on the plaintiff, the case might be different.

The defendant insists that the money was *paid* voluntarily. The error in this position is found in the fact that the money was not sent as a payment, except upon compliance with a condition.

It is also insisted that the plaintiff should be left to his remedy at law. This defense can be invoked only in case the party is entitled to the favorable consideration of the court. On the facts as they appear from the complaint, it is quite manifest that the defendant will have no available defense at law. Nor is it equitable for the defendant to use the money in question and disregard the condition which the plaintiff chose to affix.

The defendant Edwards also insists that an equity has arisen in his favor from the fact that the plaintiff holds one half of the land on which the debt is secured, as assignee of the mortgagor, for the benefit of creditors, and that the plaintiff has also made sale of a large part of the land. It does not appear that the assignment provides for the payment of the mortgage; or that any part of the land has been sold, otherwise

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than subject to the mortgage. The legal inference is, I think, that it is the equity of redemption only that was assigned for creditors, and that the mortgage debt would not be provided for as a preferred demand; and that all the sales and conveyances of this land which the plaintiff may have made, were made subject to the mortgage.

The plaintiff must have judgment on the demurrer; unless the defendants pay the costs thereof and answer within twenty days.

[NEW YORK SPECIAL TERM, April 2, 1860. *Leonard*, Justice.]

MARCELINE LESEUER vs. PIERREE LESEUER.

The words "such circumstances," in the 4th subdivision of § 42, 2 R. S. 146, which declares that although the fact of adultery be established, the court may deny a divorce, "when it shall be proved that the complainant has also been guilty of adultery under *such circumstances* as would have entitled the defendant, if innocent, to a divorce," do not refer to the circumstances, (of inhabitancy, &c.) mentioned in section 48 as defining when the court may decree divorces for adultery, but to the circumstances of procurement or connivance alone, mentioned in subdivision one of section 42.

The section virtually declares that although the court may have jurisdiction and power to grant the divorce, and the adultery on the part of the defendant shall be proved, yet the court shall not grant the divorce if the complainant has been guilty of adultery committed without the procurement or connivance of the defendant.

An answer setting up the adultery of the plaintiff, as a defense, need not allege either that the parties were inhabitants of this state, at the time of the commission of the offense; or that the defendant, at that time, and at the commencement of the action, was an actual inhabitant of this state.

DEMURRER to the answer of the defendant, in an action by the wife against her husband, for a divorce.

F. S. Stallknecht, for the plaintiff.

Condert Brothers, for the defendant.

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SUTHERLAND, J. This is an action for a divorce, on the ground of adultery. The complaint alleges that the marriage took place in this state, and that the plaintiff, at the time the commission of the offenses charged, and at the time of the commencement of the action, was an actual inhabitant of this state. The complaint also contains the other usual and necessary allegations of facts or circumstances, to show that the plaintiff, the court having jurisdiction of the cause of action, is entitled to a divorce by the provisions of the statute. (2 R. S. 145, § 42.)

The defendant by his answer admits the marriage, and that it took place in the state of New York; but denies the offenses charged. The defendant, for a further and separate answer and defense, alleges that the plaintiff had been guilty of adultery with one Bosquet, at Toulouse, in France; that the act of adultery was committed without the consent, connivance, privity or procurement of the defendant; that five years have not elapsed since the discovery of the fact that such adultery had been committed; and that the defendant had not cohabited with the plaintiff since the discovery of such adultery. The answer does not allege either that the plaintiff and defendant were inhabitants of this state, at the time of the commission of the offense, or that the defendant, at the time of the commission of the offense, and at the time of the commencement of the action, was an actual inhabitant of this state. The plaintiff demurs to this part of the answer, which sets up the adultery of the plaintiff as a defense, upon the ground that the facts stated therein do not constitute a defense.

I think the defendant is entitled to judgment on the demurrer. By the statute, (2 R. S. 145, § 42,) although the fact of adultery be established, the court may deny a divorce, "when it shall be proved that the complainant has also been guilty of adultery under *such circumstances* as would have entitled the defendant, if innocent, to a divorce." The plaintiff insists that the defendant would not be entitled to a divorce

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for the adultery alleged in the answer to have been committed by her, because it does not appear from the answer that the defendant would be entitled to a decree of divorce from *this court* for such adultery; or in other words, because the adultery of the plaintiff being alleged to have been committed in France, and there being no allegation in the answer, either that the plaintiff and defendant were at the time of the commission of the offense inhabitants of this state, or that the defendant at the time of the commission of the offense, and at the time of the commencement of this action, was an actual inhabitant of this state, this court (by 2 R. S. 144, § 38) would have no jurisdiction over such offense, and no power to grant the defendant a divorce for such offense, if innocent of the act or acts of adultery alleged in the complaint.

The question is, what do the words "such circumstances," in the 4th subdivision of § 42 of the statute, refer to? Do they refer to the circumstances, of the inhabitancy of the husband and wife, of the actual inhabitancy of the injured party, &c., mentioned in § 28, to give the court jurisdiction; or do they refer to the circumstances of procurement and connivance, &c., mentioned in subdivisions 1, 2 and 3 of § 42; or do they refer to the circumstances mentioned in both sections?

It is very clear to me that they do not refer to the circumstances mentioned in § 38, as defining when the court may decree divorces for adultery. I am inclined to think that they refer to the circumstances of procurement or connivance alone, mentioned in subdivision 1 of § 42.

The words of the 4th subdivision of § 42 are: "When it shall be proved that the complainant has also been guilty of adultery under such circumstances," &c. From the very words of the statute it would appear that the circumstances referred to must be precedent to, or cotemporaneous with, the commission of the offense. Section 38 declares when the court shall have jurisdiction. Section 42 virtually declares, that although the court may have jurisdiction and power to grant the divorce, and the adultery on the part of the defendant shall be proved,

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yet the court shall not grant the divorce, if the complainant has been guilty of adultery committed without the procurement or connivance of the defendant. In such case, this section substantially applies to the plaintiff's case the moral or maxim, "*in pari delicto potior est conditio defendentis.*"

As the answer avers not only that the adultery on the part of the plaintiff was committed without the procurement or connivance of the defendant, but also that there has been no condonation of the offense, and that five years had not elapsed since its commission, it is not necessary to decide in this case whether the words "such circumstances" refer to all the circumstances previously mentioned in section 42, or only to the circumstances of procurement and connivance. I am very clear they do not refer to any of the circumstances mentioned in section 38; and if this is so, the defendant must have judgment on the demurrer, although they refer to all the circumstances mentioned in section 42.

The circumstances, of where the adultery of the plaintiff was committed, or where the marriage took place, or of the inhabitaney of either or both of the parties at the time of the commission of the offense, or of the commencement of the action, have nothing to do with the guilt of the plaintiff in a moral view; and I think it is the guilt of the plaintiff in a moral sense, without any fault or connivance on the part of the defendant, which the statute intends to say shall prevent her or him from obtaining the divorce. (*See Morrell v. Morrell*, 1 Barb. S. C. R. 322; 3 id. 307.)

Judgment for defendant.

[NEW YORK SPECIAL TERM, April 2, 1860. *Sutherland*, Justice.]

JOHN MORRISON HUNTER vs. ALLEN M. HUNTER and others,

A testator, by his will, devised as follows: "I give, devise and bequeath to my said wife, all my lands, tenements and real estate, to have and to hold the same to her, her heirs and assigns, upon trust to receive the rents, issues and profits thereof, and apply to the use of, or pay to each of my sons and daughters an equal portion thereof during their respective natural lives; and as to my daughters, to pay them, respectively, their portion of the said rents, issues and profits, on their own separate receipt, free from any control, debts or liabilities of their respective husbands, (if any,) and in all cases in like manner, and with like effect as if sole and unmarried, as to such as shall be married at the time of, or after, my decease." *Held* that the trust was not void as unlawfully suspending the power of alienation; but that both the trust and the devise were valid.

THIS was an action for the partition of real estate, and was submitted to the court upon the complaint, answers, and points of counsel.

Alfred Roe, for the plaintiff.

N. W. Winant and Geo. N. Titus, for the defendants.

SUTHERLAND, J. This is an action for the partition of certain real estate of which Abraham T. Hunter, late of the city of New York, died seised in fee, leaving him surviving, his widow Adeline M. Hunter, (now the defendant Adeline M. Cooke, wife of the defendant Joseph P. Cooke,) and seven children, to wit, the plaintiff and six of the defendants, his only children and heirs at law.

The theory of the complaint is, that although Abraham T. Hunter left a will, executed in due form of law, by which he undertook to devise, and did in form devise all his real estate to his wife, in and upon certain trusts, &c., yet that such devise was and is null and void, and being void that his seven children on his death took and inherited, as his heirs at law, all his estate in the said real estate, subject to the dower of his widow. It appearing from the complaint that the widow, after her second marriage, had united with her husband in a conveyance, purporting to convey to the seven children all the estate, right, title, dower and interest, which they or she had,

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or might or could have, by or under the will or otherwise, in or to the said real estate, the complaint claims that the seven children of Abraham T. Hunter are now each seised in fee simple, as tenants in common, of one undivided seventh part of the said real estate.

The will of Abraham T. Hunter is set out at large in the complaint; and after a careful examination of that part of it containing the devise in question, I am inclined to think that neither the devise nor the trust thereby declared is void, and as a consequence, that the seven children of Abraham T. Hunter are not now seised in fee, as claimed by the complaint, and have no vested estate in the lands sought to be partitioned, either as the heirs of Abraham T. Hunter, or under the conveyance to them mentioned in the complaint.

By the first clause of the will, the testator gives to his wife absolutely all his personal estate, requesting her to pay therefrom to each of his sons, who shall attain the age of twenty-one years, \$4000. Then follows the devise of his real estate, which is in these words: "I give, devise and bequeath to my said wife, all my lands, tenements and real estate, to have and to hold the same, to her, her heirs and assigns, upon trust, to receive the rents, issues and profits thereof, and apply to the use of, or pay to each of my sons and daughters an equal portion thereof, during their respective natural lives; and as to my daughters, to pay them, respectively, their portion of the said rents, issues and profits, on their own separate receipt, free from any control, debts or liabilities of their respective husbands, (if any,) and in all cases in like manner, and with like effect, as if sole and unmarried, as to such as shall be married at the time of, or after, my decease."

As near as I can understand the points submitted on the part of the plaintiff, (in which all the parties appear to unite, except Adeline M. Cooke, as trustee, who, by her answer as trustee, insists that the devise and trusts thereby declared are valid, and denies that the children of Abraham T. Hunter inherited, or are seised of any estate in fee, &c.,) it is insisted

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on the part of the plaintiff that the trust, if valid, would suspend the power of the alienation of the fee during the lives of the seven children, and is therefore void ; and that the trust being void, the whole devise fails and is void ; or if the devise is valid, and the widow by it took an estate in fee, that such estate passed to the seven children of the testator, the *cestuis que trust*, by the conveyance of herself and her present husband.

The material question is, whether the trust is void ; for if the trust is allowed by the revised statutes, and valid, she could not, either alone, or with her present husband, in contravention of the trust, convey the trust estate to the *cestuis que trust*, and thus, by merging their beneficial interests under the trust in the legal title or estate, break up the trust, and defeat the will of the testator. (1 R. S. 730, §§ 63, 65.) If, therefore, the trust is valid, the conveyance by the trustee and her present husband may, in this case, be looked upon as inoperative and void.

The trust was created for a purpose allowed by 1 R. S. § 55, *subd.* 3, as amended in 1830, and is valid unless (the whole estate being in the trustee and inalienable during the trust, if valid, (1 R. S. 729, § 60 ; *Id.* 730, §§ 63, 65,) the power of alienation would thereby be suspended for a longer period than is allowed by the statute, (1 R. S. 723, §§ 14, 15 ;) that is, “ during the continuance of not more than two lives in being at the creation of the estate.”

I think the trust in question, if valid, cannot render the trust estate inalienable but for one life, that is, the life of the devisee and trustee. The devise is to the testator's wife of all his lands, &c. to have and to hold to her, her heirs and assigns, &c. upon trust to receive and apply the rents, &c. It is not specially alleged in the complaint, that the *cestuis que trust* are the children of the testator by his wife, the devisee and trustee, and not by some former wife ; but I assume that they are. Did not then the testator intend the trust to cease, and must it not cease on the death of the trustee ? If the *cestuis que trust* survive the trustee, the whole estate being

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inalienable during her life, on her death must vest in the *cestuis que trust* by descent, as her heirs at law, or under the will as a contingent future estate thereby limited or created; and as a person cannot be a trustee for himself, the trust must then cease, and the *cestuis que trust* have the free and absolute disposition of the entire estate. If one, or more, or all of the *cestuis que trust* should die before their mother, the trustee, the trust must cease in part, or in whole, upon his, her or their death.

If the trustee has or should have other children by her present or any future husband, who should survive her, they would take by descent from her, or by limitation under the will as her heirs, in common with her surviving children by the testator, and the surviving issue of such as may have deceased; but then the trust must wholly cease, on the death of the trustee, for the undivided estate, or interest so taken or held by the children of her present or future husband in common, would not be subject to the trusts of the devise in favor of the surviving children of the testator.

In fine, as the trust must wholly cease on the death of the survivor of the *cestuis que trust*, and as the *cestuis que trust* are not only the heirs of the testator, but if they survive the trustee, must be her heirs, the trust must cease on the death of the trustee, by the merger of the legal and beneficial estates or interests, whether her heirs take the trust estate by descent from her, or as a contingent remainder, or future estate, limited by the will on the life estate in effect, though not in form, given to her in trust, &c.

I think the devise in question should be looked upon as substantially and in effect a devise to the wife for life, in trust &c., remainder over to her right heirs; or as a devise to her right heirs, at and upon her decease, authorizing and directing her to receive the rents, issues, &c. during her life, and apply, or pay them, as specified in the devise. A devise in the latter form would imply a devise to her for life upon trust, &c., remainder over.

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The devise may be considered as substantially a devise to the heirs of the trustee, subject to the execution of the trust; or as a devise to the wife in trust &c., declaring to whom the lands shall belong on the failure or termination of the trust. (1 R. S. 729, § 61.)

It appears to me quite immaterial, whether the heirs of the trustee, on her death, take from her by descent, or as purchasers under the limitations or provisions of the will. In either case, the vesting of the estate in them, must displace or merge, and I think was intended to displace or merge all the beneficial estate or interest of the surviving *cestuis que trust*.

If it should be considered that the devise is in effect, as it is in form, a devise to the wife in fee simple, subject to the trust, and that the trust will not wholly cease, until *all* the *cestuis que trust* shall have deceased; even upon that construction, I am not prepared to say that the trust or devise is void. If, as the *cestuis que trust* successively die, one seventh of the trust estate is freed from the restraint on its alienation produced by the trust, will, or can, the alienation of any part or portion of it be restrained by the trust for more than one life? (See *Savage v. Burnham*, 17 N. Y. Rep. 562; *Mason v. Mason's Ex'rs*, 2 Sandf. Ch. 432.)

In any view of this devise, I am not satisfied that the trust is void; that there is any unlawful suspension of the power of alienation created by the trust or by any contingent future estate created or limited by the will, or that the children of the testator have any *vested* estate in the lands sought to be partitioned as his heirs at law or otherwise.

The construction of this part of the will is certainly difficult and doubtful; and I must say that I think the person who drew it, whether lawyer or not, exhibited great skill in creating doubts and difficulties even in using the most direct and apt words.

My conclusion is that the complaint should be dismissed.

COE *vs.* BECKWITH and others.

81b	339
c	65 AD *256

The conveyance of a rail road in trust to secure bondholders, with authority to the trustee, on default of the company in paying coupons, to take possession and run the road and collect the income, gives no title to money voluntarily deposited to the credit of the trustee for the payment of coupons, by the officers of the rail road company, when the trustee has not taken possession of, or run the road, nor taken any action against the company by virtue of the trust deed.

Money deposited to the credit of a person designated in the deposit as a trustee, under prior instructions to such person and to the depository that the money should be applied to the payment of several creditors, cannot be reached by attachment in favor of one of those creditors, against the debtor, in an action at law.

The person to whose credit the deposit is so made is a trustee of the fund, and is entitled to apply to a court of equity for instructions in the execution of his trust.

The creditors have a vested interest in the fund, and the debtor making the deposit cannot afterwards control or divert it.

In an action by the trustee, for instructions, from the court, as to the administration of the trust, neither the sheriff holding a warrant of attachment against the depositor, nor the depository of the fund, are necessary parties, where the plaintiff in the attachment suit has been joined as a party.

In such action all the creditors need not, in case they are numerous and unknown to the plaintiff, be joined as parties.

A demurrer cannot perform the office of a plea in abatement for want of parties, by furnishing the names of persons deemed necessary parties to the action, who have not been joined.

DEMURRER to complaint. The substance of the complaint is given in the opinion of the court. The grounds of demurrer were: 1. That this court has no jurisdiction of the person of the defendant. 2. That it has no jurisdiction of the subject of the action. 3. That there is a defect of parties defendants in this, that the following persons should be joined as defendants: (1.) The Cleveland, Zanesville and Cincinnati Rail Road Company; (2.) The United States Trust Company; (3.) John Kelly, sheriff of the city and county of New York; (4.) Francis Vose, Edward Livingston, Charles L. Perkins, and such others as were known to the plaintiff to be holders of the unpaid coupons due on said bonds,

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and of said bonds. 4. That the complaint did not state facts sufficient to constitute a cause of action.

Frederick A. Lane, for the plaintiff.

Frederick E. Mather, for the defendant Beckwith.

LEONARD, J. The defendant Beckwith has demurred to the complaint in this action. The plaintiff alleges in his complaint that he is a trustee under a trust deed from the Cleveland, Zanesville and Cincinnati Rail Road Company, conveying the track, equipments, tolls and income of the road, to secure the holders of the first mortgage bonds of the road, amounting to \$500,000, and is authorized thereby to take possession of the road and equipments, carry it on, and apply the proceeds to the payment of the bondholders, after deducting expenses, in case the company make default in paying the coupons, &c. as they become due, for the period of sixty days, after demand by the bondholders. That none of the coupons have been paid by the company since 1856. That the plaintiff, under the trust deed, took possession of the tolls and income, and the same were deposited in the United States Trust Company to the credit of "George S. Coe, trustee." The complaint sets forth a letter to the trust company from the president of the rail road company, dated February 19, 1858, informing the trust company that all funds thereafter remitted by the rail road company "are to be deposited to the credit of George S. Coe, trustee of our first mortgage bonds, for the purpose of paying the coupons on our bonds secured thereby." The rail road company had previously deposited funds in the trust company, since the rail road company had ceased paying coupons at maturity, to the credit of the plaintiff as trustee, and Beckwith had been paid some \$453 on coupons then overdue. The complaint states that various sums have since been deposited in the trust company, to the credit of "George S. Coe, trustee," which the plaintiff took possession of under the said deed, and which were intended to meet those coupons of the

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rail road company on these bonds due in 1856. That an attachment has been granted by this court in an action brought by Beckwith against the rail road company, on coupons of the first mortgage bonds due in 1856, 1857, 1858 and 1859, amounting to \$9520, directed to the sheriff of this city, who has served it on the trust company and on the plaintiff, accompanied by a special notice that Beckwith claims that the attachment covers funds mentioned in the letter of 19th February, 1858. That Beckwith claims to hold the funds now on deposit in the trust company to the credit of the plaintiff as aforesaid, by virtue of the said attachment. That the holders of the coupons are numerous, and unknown to the plaintiff, and it is impracticable to make all the holders thereof parties. Four parties who are holders of a large amount of these coupons are made defendants, and they have made demand on the plaintiff for payment out of the funds so deposited to his credit in the trust company. The plaintiff alleges that he apprehends that he will be involved in some personal liability if he should pay the one or the other of these claimants, and he demands the instructions of the court as to who is entitled to the funds standing to his credit as trustee in the manner above mentioned.

The defendant, as one of his grounds of demurrer, insists that the complaint does not state facts sufficient to constitute a cause of action.

It is necessary, then, to ascertain whether the plaintiff has any title to these funds, as a trustee. If he has such title, he is entitled to apply to this court for instructions as to his conduct in relation to the trust, when questions of difficulty arise; and in that event, also, the defendant will have acquired no lien upon the funds in question by virtue of his attachment.

In my opinion the complaint fails to make title in the plaintiff to the funds in question by virtue of the trust deed. In order to derive title under this deed, it is necessary that the plaintiff take possession of the rail road, and run it, whereby he would be entitled to the tolls and income, and after

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paying expenses, could divide them among the bondholders. The complaint does not, however, allege that the plaintiff has taken possession of the road, or run it. The funds have been deposited to his credit in the trust company as trustee, but he did not acquire them in any manner by virtue of any power or authority under the trust deed. The complaint does not show that any one was under any legal liability to deposit those funds to the credit of the plaintiff, any more than to the credit of another person. The position which he held, rendered him a very proper person to be chosen for the purpose of receiving and paying out the funds; but there is nothing to show his right to compel any person to account to him for the earnings of the road. The plaintiff could acquire that right under the deed, only by taking possession of the rail road. True, the complaint alleges that he has taken possession of the tolls and income, but how did he do it? That has not been disclosed. The money in question may have been taken possession of by being deposited to the plaintiff's credit, and that is all that this allegation (from the other facts stated) can mean in this case.

The allegation that the plaintiff took possession of this money by virtue of the deed, is merely a mental deduction or conclusion, without any facts stated upon which any one else can arrive at the same result.

It is stated in the complaint that an officer of the rail road company visited the east, after the company were in default for the non-payment of coupons, for the purpose of making an arrangement with the bondholders; but it is not alleged that any arrangement was in fact effected, or that any change was made in the trust, or in the manner of securing the payment of the bonds or coupons; or any thing from which the plaintiff derives title to the funds in question.

The plaintiff must stand, so far as this complaint is concerned, upon the appropriation made by the letter of February 19th, 1858, and the actual deposit made in pursuance thereof. The complaint does not state, expressly, that the

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rail road company deposited the funds in question ; but from the whole tenor, it is fairly to be inferred. . If not deposited by the rail road company, then none of the defendants have any interest therein. The allegation is that *there has been deposited* various sums in the trust company to the credit of George S. Coe, trustee ; but who made the deposits, or from what source derived, is not definitely stated. It was then alleged that the plaintiff took possession of them under the trust deed. That he took possession is probable, but that he did so under the deed is impossible from the evidence of any fact alleged. The complaint then alleges that the funds so deposited were intended to meet the coupons which fell due in 1856. This latter averment is pregnant with meaning, and is probably the saving fact in the complaint.

I am of opinion that the allegations of the purpose for which the deposits were made, of the taking possession thereof by the plaintiff, and of the letter of February 19th, 1858, apprising the trust company of the account and purpose for which the future deposits of the rail road company were to be made, constitute an appropriation of the funds ; and that the plaintiff was invested thereby with the title thereto as trustee for the holders of the coupons, who had an immediate right therein, and could enforce a pro rata division thereof on demand, and was not invested therewith as agent only for the rail road company. The rail road company cannot control or reclaim the deposit. As to them, the deposits are appropriated. The trust company would be liable to the plaintiff, in a suit on behalf of the holders of the coupons, if they should suffer these deposits to be withdrawn on the authority of the rail road company alone.

The objection of the want of authority in the officers of the rail road company to make these deposits in the manner they did, is not tenable, inasmuch as if deposited without authority the act would constitute a breach of trust. It does not appear that the officers had not the authority. Courts never

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assume a breach of trust to have been committed. Authority to make the deposit must be presumed.

The objection for the want of proper parties is not, I think, well taken.

1. The rail road company have fully parted with all, title to the money, and have dedicated it to the holders of the coupons.

2. The plaintiff's check will afford a good discharge to the trust company, and the coupons which he retires, he will then hold as the trustee or agent of the rail road company. Therefore neither the trust or rail road companies are necessary parties.

3. The sheriff has no interest, at present. The fund is not in his possession or control.

4. The plaintiff's excuse for not joining all the holders of coupons, is well recognized and sufficient, viz. that they are numerous and unknown.

The demurrer is irregular in naming others who are holders of such coupons, who have not been joined as defendants. It assumes the functions of a plea in abatement. No conclusion is to be drawn therefrom adverse to the plaintiff, as such statements are not within the office of a demurrer.

The defendant Beckwith is one of the same class of coupon holders as the other defendants, and entitled to participate with them pro rata only; and it would be wholly unjust and inequitable for him to obtain the whole fund, or more than his share, by a common law action upon his coupons. At least it so appears from the allegations of the complaint.

Judgment must be for the plaintiff on the demurrer, with leave to the defendant to answer the complaint in twenty days. The costs of the demurrer are to abide the event of the action.

[NEW YORK SPECIAL TERM, April 14, 1860. *Leonard*, Justice.]

LA FARGE vs. MANSFIELD and others.

Where it appears from the terms of a lease of a store in a building being erected by the lessor, and from the subsequent acts of the parties, that they understood the property rented was to be a finished store, fit for immediate occupancy for the purposes for which it was leased, a covenant in the lease, on the part of the lessor, will be implied, that the store shall be finished and fit for use as a store, by the time stipulated for the commencement of the term. **INGRAHAM, J.** dissented.

Where lessees have never in fact taken possession of the demised premises as tenants, they can only be made liable for the rent upon their covenants, as for a breach of an executory contract.

In such a case, to entitle the lessor to recover the rent, it is incumbent on him to show that he has performed on his part.

If the lessees have taken possession, so that they became vested with the term, a breach of the agreement, on the part of the lessor, will constitute no defense to an action to recover the rent reserved. They can only recoup the damages actually sustained.

THIS was an action on a guaranty. The plaintiff executed a lease to Joseph A. Weibel and William S. Clirehugh, for the term of five and a half years, and the defendants executed a guaranty on behalf of the lessees. The premises were certain rooms in the La Farge Hotel. The lease provided that, if the premises should be rendered untenable by fire, the term should thereupon immediately cease. The term was to commence on the 1st day of November, 1853, and the building was destroyed by fire on the 7th day of January, 1854. The plaintiff claimed rent from November 1, 1853, to January 7, 1854. The premises were demised as a store, consisting of one front room on the first floor, with a basement room beneath it, to be used as a bathing and hair dressing establishment, and for a gentlemen's furnishing and perfumery establishment, and for no other purpose. The plaintiff stipulated with the lessees that the latter should expend not less than \$5000 in the decorations, fixtures and furniture of the store. He agreed, on his part, to do the plumbing work; to lay the steam pipes, to heat the store; to lay a marble floor, and to have the store in tenantable order for the lessees, by the 1st of November. It was upon these express conditions

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that the lease was given by him and taken by the lessees. The plaintiff represented that the hotel connected with the store, and upon which it mainly depended for its business, would be ready and all finished by November 1, 1853. The hotel was not open for business at the time of the fire, January 7, 1854. The above agreements between the plaintiff and the lessees were made before the execution of the lease. The lease was executed on the 19th of September, 1853. At that time, the La Farge Hotel was building. The rooms in question then were wholly unfinished; there were no windows, the floors and doors were incomplete, and the stairs leading from the basement to the first floor were not built. The plaintiff's men were at work on the premises when the lease was made, and continued at work there till November, and thence until the fire occurred. The locks were put on the doors the week next before the fire. Up to the time of the fire, the plaintiff's men daily opened and shut the premises. In the mean time, the lessees were preparing the premises for their use, but had not completed the preparations, nor commenced the business for which they took the lease. The arrangements for heat, steam and hot water were to be furnished by the plaintiff, and his men were at work upon the same. The supply was to come by pipes, from a furnace and boiler in the hotel part of the building. This apparatus was nearly done, and would have been ready for use the day after the fire. The hotel itself, with which the store was connected, and upon which it mainly depended for business, had not gone into operation at the time of the fire. There was some diversity in the evidence as to the state of forwardness of the premises, but none as to the fact that the premises had not become capable of the use mentioned in the lease, nor had it been put to such use at the time of the fire. The plaintiff had a verdict for the amount claimed. The defendants made a case with exceptions, and had leave to move upon the same for a new trial, at the general term, in the first instance.

The defendants' counsel requested the court to charge that

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the jury might imply a covenant that the building should be completed by the landlord by the 1st day of November. The court refused so to charge, and the defendants' counsel excepted. The defendants' counsel also requested the court to charge that no rent accrued while the landlord, by his workmen, was in the premises doing work for him; or before the windows were glazed; or before the premises were so far completed by the landlord as to allow of the same being immediately used for a hair dressing and bathing saloon. The court refused so to charge, in either particular, and the defendants' counsel excepted.

Charles Tracy, for the appellants.

John A. Bryan, for the respondent.

PRATT, J. It is pretty difficult to ascertain, from the exceptions, what point the counsel for the defendants designed to raise, and the points upon which the case was put to the jury. The principal witness for the defendants testified that, before the time for the commencement of the term, the tenants were allowed to occupy the premises for the purpose of preparing them for their business; and that they so occupied them, in conjunction with the workmen of the plaintiff, up to the time of the fire; but that the store had never been used by the lessees, or opened by them to the public.

It seems to me from the testimony, that there was a fair question, to be submitted to the jury, whether the lessees had, in fact, ever taken possession of the store, as tenants. If they had not, then they could only be made liable for the rent upon their covenants as for a breach of an executory contract. In such case, it would be incumbent on the plaintiff, to entitle him to recover, to show that he had performed on his part. If the lessees took possession, so that they became vested with the term, a breach of the agreement, on the part of the lessor, would constitute no defense to an action to recover the rent

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reserved. They could only recoup the damages actually sustained. But, as this raised a fair question to be submitted to the jury, it became important to inquire whether there might not be implied in the lease a covenant, on the part of the lessor, that the store should be finished and fit for use, as a store, by the time stipulated for the commencement of the term. If there could be no such covenant implied, on the part of the lessor, then it was immaterial whether the lessees took possession or not, or whether the store was fit for use or not. It seems to me, therefore, that the true construction of the lease was the first thing in order, in going to the jury, and the counsel for the defendants was entitled to a correct ruling upon that.

The question then arises, was there any such implied covenant? My impression is that such a covenant should be implied. The lease should be construed in the light of the surrounding circumstances. It was the lease not of a lot with erections, but of a single store in a large building then in the course of being erected by the landlord. It can scarcely be assumed that the parties contemplated a store in a half finished state, by the term store. And the subsequent acts of both parties, if any thing else was wanted, show that the parties understood that it was to be a finished store, fit for immediate occupancy for the purposes for which it was leased. I think, therefore, that there was error in refusing to instruct the jury as requested.

As the judge refused to instruct the jury that such a covenant might be implied, it would, of course, be futile to go to the jury upon the question of actual occupancy by the lessees; and it must be, therefore, assumed that no such question was submitted to them. Indeed, it is difficult to perceive what question of fact was left to be submitted to the jury, after a refusal to instruct them that a covenant to have the store in readiness for occupancy on the 1st of November might be implied.

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Upon the whole, I think a new trial should be granted. (*Mayor &c. of New York v. Mabie*, 3 *Kernan*, 151.)

ROOSEVELT, P. J. concurred.

INGRAHAM, J. (dissenting.) It is not necessary to decide whether the jury could imply a covenant that the buildings leased by the plaintiff should be completed by the 1st of November. If there was any such covenant to be implied, the defendants do not seek to recoup any damages therefor; and this would be the only way in which the breach of such a covenant could be made available to the defendants, after they had taken possession of the premises leased to them.

A tenant has no right to take possession of premises hired by him, and, at the same time, claim that he is relieved from the payment of rent, because some part of the premises is not in a condition such as he contemplated it should be at the time of the hiring. If he is entitled to any redress therefor, he must either claim it, by way of damage, or abandon the premises entirely. The cases cited by the defendants, of *Trull v. Granger*, (4 *Seld.* 115,) and *The Mayor &c. of New York v. Mabie*, (3 *Kernan*, 151,) go no further than to allow a party damages by way of recoupment, for a breach of an implied covenant of possession.

The answer merely denies that any liability exists, because the premises were not completed; and that the defendants never had possession. This point covers all the alleged errors of the court in refusing to charge the jury as requested by the defendants' counsel.

The same principle disposes of the other objections of the defendants' counsel. It is said that the lessees never had possession of the premises; but, as this point was distinctly made in the answer, the finding of the jury must be considered conclusive, upon that defense. If the tenants did take possession, then, having retained possession, while the premises were not completely finished, they should either have completed them

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at their own expense, and charged the cost to the landlord, or asked redress in their answer, by way of damage. Not having done either, I see no relief to be obtained by them in this action for the recovery of the rent.

New trial granted.

[NEW YORK GENERAL TERM, June 4, 1859. *Roosevelt, Pratt and Ingraham*, Justices.]

YORKS vs. PECK.

A subpoena to testify as a witness is a "process," within the meaning of the statute prohibiting any person, not the general law partner of an attorney, or a clerk in his office, from suing out any process, &c. in the name of such attorney. (2 R. S. 287, § 70.)

THIS was an appeal from a judgment entered on the report of a referee. The action was brought to recover of the defendant three several penalties of \$50 each, for violation of section 70 of title 2, part 3, ch. 3, and art. 3 of the revised statutes, (3 R. S. 477, 5th ed.) which is as follows, viz: "If any attorney or solicitor shall knowingly permit any person, not being his general law partner, or a clerk in his office, to sue out any process, or to prosecute or defend any action in his name, such attorney and solicitor, and every person who shall so use the name of any attorney or solicitor, shall severally forfeit to the party against whom such process shall have been sued out, or such action prosecuted or defended, the sum of fifty dollars."

The cause was tried by and before a referee, who found the following facts: That in November, 1856, and subsequently, Bartholomew Skaats was an attorney and counsellor at law, practicing in the city of New York, and having but one office, at 111 Broadway. The defendant, Peck, was never a general law partner in the practice of the law with said Skaats, nor was he ever a clerk in his office. About the time mentioned, Skaats, as attorney, had recovered in this court, in favor of

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Ambrose Stevens, as plaintiff, against Anthony Yorks, defendant, a judgment, upon which he issued an execution, directed to the sheriff of Livingston county, and inclosed the same in a letter to the defendant in this action, who then resided in Lima, in said county, where he has ever since continued to reside. That the sheriff of Livingston county afterwards duly returned the said execution, wholly unsatisfied. That proceedings were thereupon instituted, supplementary to execution, under the provisions of the code of procedure, against the said Anthony Yorks, and were pending before a referee appointed by an order for that purpose, when the defendant in this action, on the 7th of March, 1857, sued out of this court the subpoena first mentioned in the complaint, and signed thereto the name of the said Skaats, as attorney, and caused the same to be served on the plaintiff in this action. This was a subpoena commanding the plaintiff to appear before C. C. Davison, Esq., a referee, and be examined as a witness in said action brought by Ambrose Stevens against Anthony Yorks, and to produce certain papers in the subpoena specified. That afterwards, such proceedings, supplementary to execution as aforesaid, were again instituted, and were pending before another referee, by order, for that purpose, when the defendant in this action, on the 21st of November, 1857, sued out of this court the subpoena secondly mentioned in the said complaint, and signed thereto the name of the said Skaats, as attorney, and caused the same to be served on the plaintiff in this action. That the plaintiff in this action did not appear in obedience to the subpoena last hereinbefore mentioned. That the defendant in this action thereupon, and for that cause, sued out of this court an attachment for contempt of court, in not obeying said subpoena, and signed the name of the said Skaats, as attorney, thereto, and issued the same in his name, as attorney, which was served by the sheriff of Livingston county, on the plaintiff in this action.

As a conclusion of law, from the foregoing facts, the referee

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found and reported that the defendant in this action had violated the provisions of the 70th section of title 2, ch. 3, part 3 of the revised statutes, and had, in three several instances, used the name of an attorney of this court, not being the general law partner of such attorney, or a clerk in his office, to sue out process against the plaintiff in this action, and had forfeited to the plaintiff three penalties of the sum of \$50 each. He therefore adjudged and decided that the plaintiff was entitled to recover of the defendant the sum of \$150 besides costs; and from the judgment entered upon the report the defendant appealed.

M. S. Newton, for the appellant.

H. J. Wood, for the respondent.

By the Court, JOHNSON, J. I have no doubt whatever, that a subpoena is a process, within the meaning of the statute under which this action is brought. (2 R. S. 287, § 70.) The language is "any process," and was obviously intended to include any and every process which, by being served upon the party named in it, would give the court or officer before whom any proceeding was had, jurisdiction over such person. This would include a subpoena, which has always been regarded as a process.

It was strenuously contended by the defendant's counsel, upon the argument, that inasmuch as it was shown that the defendant had used the name of the attorney, wholly without his knowledge or consent, he was not amenable to the penalty prescribed by the statute. But this is of no consequence, except in a moral point of view. In that aspect it aggravates the offense, while it affords no shield to the offender. The obvious design of the statute was to protect persons from being vexed and harassed, by the use of an attorney's name, for any of the purposes mentioned in the section, by any person other than the attorney himself, or by his general law partner, or a

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clerk in his office, and to furnish them a remedy, if they were so injured. The attorney incurs the penalty if he knowingly permits such use of his name, while every other person, not falling within the exception, incurs it, by the use of the name for such purpose, whether the attorney knowingly permits it or not. The words "so use" manifestly mean using for the forbidden purpose, without the authority pertaining to a general law partner, or clerk in the office of the attorney, whose name is used. By no other construction could the mischief which the legislature had in view be remedied. The referee was, I think, entirely right in his interpretation of the section, and the judgment should be affirmed.

[MONROE GENERAL TERM, March 5, 1860. *Wells, Smith and Johnson*, Justices.]

In the matter of the application for the admission of the
GRADUATES of the Law Department of the UNIVERSITY
OF THE CITY OF NEW YORK to practice as attorneys and
counsellors.

The legislature had no constitutional right or power to pass the act of April 6, 1860, constituting the faculty of law of the university of the city of New York a committee, upon whose examination and recommendation, as evinced by the degree of bachelor of laws, conferred, upon their recommendation, by the council of the university, any graduate of the law department, shall be admitted to practice as attorney and counsellor at law in all the courts of this state; and thus to take away from the supreme court the right and power which it had previously exercised, of ascertaining and determining for itself, and under its own rules and regulations, whether the applicants are of the class or description of persons, by the constitution entitled to admission, and have the requisite constitutional qualifications, of learning, ability and moral character.

That act is in conflict with section eight of article six of the constitution.

The legislature had no right to declare that diplomas conferred under the act *shall* be sufficient evidence of the requisite learning and ability of the applicants, and *shall* entitle them to admission; either with or without the evidence of moral character, citizenship and age, required by the second rule

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of the court; or with or without evidence of their attendance in the university, and of their study of the law elsewhere, for the period or terms mentioned in the act.

Accordingly *held* that graduates of the law department of the university of the city of New York cannot be admitted to practice as attorneys and counselors, without submitting to the usual examination.

T. W. DWIGHT, for the application.

By the Court, SUTHERLAND, J. A motion is made in behalf of twenty-two young gentlemen, graduates of the law department of the university of the city of New York, for their admission to practice as attorneys and counsellors of this court, under a recent act of the legislature of this state. (*Chap. 187, passed April 6, 1860.*)

The act is entitled "An act with reference to the university of the city of New York." The first section of the act is as follows: "The faculty of law of the university of the city of New York are hereby constituted a committee, upon whose examination and recommendation, as evinced by the degree of bachelor of laws, conferred upon their recommendation by the council of the university, any graduate of the law department shall be admitted to practice as attorney and counsellor at law in all the courts of this state; but no diploma shall be sufficient for such admission, which shall be given for a period of attendance upon said law department, less than three terms of twelve weeks each, or than two terms of twelve weeks each, with one year's study of the law elsewhere."

This motion is made on the certificate of the individuals composing the faculty of law of the said university, certifying that these twenty-two young gentlemen "have attended the law department of the said university for two terms of twelve weeks each, and have pursued the study of law one year elsewhere;" and further certifying, that upon their recommendation, after a thorough and critical examination by them, the council of the university had conferred upon these young gentlemen the degree of bachelor of laws.

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We are inclined to think, that the diplomas themselves should have been produced, as the best evidence of their having been conferred on the applicants; but as the certificate leaves no room for doubt that the diplomas have been conferred on the applicants, in accordance with the act, we should at once direct an order for their admission to be entered, on the production of their diplomas and filing the certificate, if there were not other and more serious objections to their admission under this act.

After a careful examination of the question, we think the legislature had no constitutional right or power to pass the act; and thus take away from this court the right and power which it has heretofore exercised, of ascertaining and determining for itself, and under its own rules and regulations, whether the applicants are of the class or description of persons, by the constitution entitled to admission, and have the requisite constitutional qualifications, of learning, and ability, and moral character.

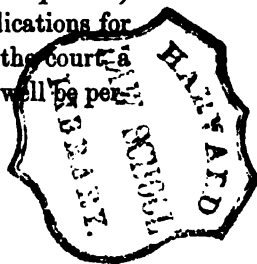
By section 8 of article 6 of the constitution, "Any male citizen of the age of twenty-one years, of good moral character, and who possesses the requisite qualifications of learning and ability, shall be entitled to admission to practice in all the courts of this state."

We think the act in question conflicts with this provision of the constitution in more than one respect.

1st. The constitution in effect declares, that the applicant, to be entitled to admission, must be a male, a citizen, and of the age of twenty-one years.

The act in effect declares, that any graduate of the law department of the university, irrespective of sex, age or citizenship, upon whom the diploma has been conferred under the circumstances mentioned in the act, shall be admitted to practice, &c. (*See McKoan v. Devries*, 3 Barb. S. C. Rep. 196.)

If the act is constitutional and valid, on applications for admission under it, it would appear to leave for the court a ministerial, formal duty only, and which could as well be per-



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formed by the clerk, or the crier, as by the court. The act would appear to make the diploma conferred by the council of the university conclusive evidence to the court, not only that the applicant is possessed of the requisite qualifications of learning, ability, and good moral character, but also that the applicant is of the age of twenty-one years and a male citizen; thus taking from the court all right of inquiry into any of these circumstances, and all judicial discretion and control as to, or over, the applicant's admission.

If constitutional, the act is in effect a legislative mandamus to the court *to admit*, on the presentation of the diploma, and satisfactory evidence that it had been given for a period of attendance upon the law department of the university, or of such attendance with one year's study of the law elsewhere, not less than that specified in the act. This mere ministerial duty, which the act would appear to leave in the court, and which this motion assumes the court should perform in the usual way, by directing an order for the admission of the applicants to be entered, and by granting them the usual diplomas or licenses to practice, would appear to be not only useless, but inconsistent—useless; because, if the diploma of the council of the university is, or should be, sufficient evidence of the applicant's constitutional qualifications, to authorize the court to grant its license, then the diploma of the council of the university is, or should be, sufficient evidence of the applicant's qualifications and right to practice, without any other, or further diploma from the court—and inconsistent; because the license or diploma of the court would be, or ought to be, substantially a certificate that the applicant has the constitutional qualifications and right to practice; but how can the court give this certificate on the mere certificate or diploma of the council of the university, which certificate or diploma of the council has been conferred on the mere certificate or recommendation of the faculty of law of the university, a body constituted or composed no doubt of individuals of great learning and discretion, but not appointed or appoint-

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able by, or deriving any authority from the court, and in no way controllable by, or responsible to the court. Indeed, if the legislature had the constitutional right and power to constitute the faculty of law of the university a committee to ascertain, determine, and certify to the constitutional qualifications of the applicants, and intended to do so by this act, why was the act so worded as to require or imply that an application for *admission* should be made to the court, and that the court should also grant a diploma or license? If the main purpose of the act was authorized by the constitution, why was the mere useless ceremony of an application for, and of the court's granting a license, retained? What higher authority, or better evidence of his right to practice on taking the oath of office, could the applicant have or require, than the constitution, the act of the legislature, and the diploma specified in the act, and conferred on him, under the circumstances specified in the act? Is not the application for admission to, and the granting of a license by, the court, which this motion assumes to be required, and which probably is required or implied by the act, inconsistent with the main purpose of the act?

2d. We are inclined to think, that the proviso or condition of the act, which declares that no diploma (of the council of the university) shall be sufficient for such admission, unless given for an attendance upon the law department of the university, with or without one year's study of the law elsewhere, for not less than certain terms or periods specified in the act, brings the act in conflict with the constitutional provision, and may be considered as in effect nullifying the act.

The constitution prescribes no term or period of clerkship, or of study; or standard of learning or ability; upon, or by which, the applicant is to be examined, admitted or rejected. On the contrary, it is plain that the constitution intended to regulate and limit the power which the court then had over the admission of attorneys, &c. and to abolish the right and practice of requiring by certain prescribed rules and regulations, a certain period of clerkship, or study of the law as a prelim-

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inary or condition to the right of an examination for admission. The constitution says, "*any* male citizen of the age of twenty-one years, of good moral character, &c. *shall* be entitled," &c. If the applicant for admission is a citizen, and of the age and sex mentioned in the constitutional provision, the constitution in effect appoints him to the office of attorney, &c. upon his character, and the extent and sufficiency of his learning and ability, being ascertained and passed upon favorably. The constitutional provision would certainly appear to be inconsistent with any right of the legislature or of this court to impose upon the candidate for admission, the terms or conditions of attendance upon the law department of the university, specified in the act in question, or indeed any prescribed course or term of study or preparation at the university, or elsewhere, as a condition of examination. The act declares that the diploma conferred by the council of the university *shall not* be sufficient evidence for the applicant's admission, unless given for a period of attendance upon the law department, &c. of not less than that specified in the act. Then, conceding that the legislature had the constitutional right to declare that the diploma of the council of the university should be sufficient evidence of the qualifications and right to admission of the law students of the university, why does not this unauthorized condition of a certain period of attendance upon its law department, imposed by the statute—whether for the benefit of the students, the profession, the professors, or the university, it is unnecessary now to inquire—completely nullify the act? The act would appear to present an instance of a legislative *felo de se*.

It is certainly quite clear, if this proviso or condition does not destroy the act, and the legislature had the right to declare that the diplomas conferred by the council of the university should be sufficient evidence, &c. that the applicants should be admitted on the presentation of their diplomas alone, and without requiring of them any evidence of a certain

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period of attendance upon the law department of the university, or of the study of the law elsewhere.

3d. But the important question raised by this motion is, whether the convention which framed the constitution did not intend, by the provision before quoted, to leave or vest in this court the appointment of its attorneys and counsellors, and the strictly discretionary and quasi judicial power and corresponding duty, of ascertaining and passing upon the constitutional qualifications required for appointment to those offices implied in the right of appointment. This is the important question; because the legislature, if it has the right to confer this discretionary power on the faculty of law, or the council of the university of New York, has the right to confer it on any committee, tribunal, person or officer; and the legislature may not always exercise this right as discreetly as they have by the act in question.

We are inclined to think, from the express words of the provision of the constitution, that the intention of its framers was to leave or vest in this court the right of appointing its own attorneys and counsellors, and the right of ascertaining and passing upon the requisite qualifications of applicants, by and through its own committee of examination.

The words of the constitution are, "any male citizen of the age of 21 years, &c. of good moral character, and who possesses the requisite qualifications, &c. shall be entitled to admission," &c.

Shall be entitled to admission by whom? By whom but the court? What does the word, *admit*, or do the words, *to admit*, mean? To grant leave, to grant leave to enter into. Does not the right of granting leave imply the right of refusing leave? and do not the words of the constitution plainly imply that the court shall have this right? and does not this right or power of granting or refusing leave, imply, in the absence of any other express provision of the constitution on the subject, the right and duty of ascertaining and passing upon the qualifications of applicants for admission? If the words

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of the constitution had been, "shall be entitled to admission" *by the court, or courts*, there could not have been a doubt that the provision was intended to leave with the court, subject to the limitations or restrictions implied by the provision, the whole subject of the admission of its attorneys and counsellors, and the exclusive power and duty of passing upon their qualifications, and right of admission.

Suppose the constitution declared that any stenographic reporter of the requisite qualifications, &c. should be entitled to enter the halls of the legislature for the purpose of reporting its proceedings. Would not such a declaration or provision imply and vest in the legislature the quasi judicial power and discretion of passing upon the qualifications of every reporter who applied for admission, or leave to enter for such purpose?

A brief reference to the circumstances under which the provision in question was inserted in the constitution, would appear to leave no room to doubt that it was the intention to leave with the courts the power, discretion and duty in question.

The constitution of 1777 (sec. 27) gave the appointment of attorneys, &c. to the courts, without any limitation. Under it the court could admit minors or aliens; the court having and exercising, indeed, full discretion and power over the whole subject. (1 *John*. 528. 5 *id.* 192.)

The constitution of 1822 does not allude to the subject, nor indeed to the power or jurisdiction of the supreme court, simply speaking of it as a court already in existence. (*Article 5, sec. 4.*)

By the revised statutes, attorneys, &c. were defined to be not only public officers but judicial officers; and in the absence of any provision made for their appointment in the constitution of 1822, the revised statutes declared, that they should be appointed and licensed to practice by the several courts in which they intended to practice, and that the supreme court should prescribe the rules and regulations under which they should be appointed and licensed in that court. Previous to

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the revised statutes, they were considered and had been judicially held to be, not only officers of the court, but public officers. (1 *Hopk. Ch. R.* 6. 2 *Cowen*, 13.) Section 3 of article 6 of the constitution of 1846, declares and confirms the general jurisdiction of this court; and section 5 of the same article must operate, and was probably intended to operate, as a limitation of the powers of the legislature over its jurisdiction and proceedings; then follows in connection, the provision in section 8 of the same article, in relation to the admission of attorneys and counsellors to practice. These provisions of the constitution of 1846, must be presumed to have been adopted with knowledge of this power of the court, and of the rules and regulations which had been prescribed by it, and then in force, under which it was exercised.

This provision of the constitution of 1846 should be looked upon as a mere limitation or regulation of a recognized and conceded power of the courts; and the principle which should control its construction is, that the mere limitation or regulation of a political or governmental power or trust by the sovereign power (for the convention which framed the constitution represented, and the people who ratified it were and are the sovereign power, and not the legislature,) should be considered as leaving and confirming the power as thus limited or regulated in the tribunal or officer exercising, and authorized to exercise such power, in the absence of any express declaration or provision of the sovereign power to the contrary, or inconsistent with such construction. To adopt this principle in the construction of this provision of the constitution, would be merely recognizing and applying in its construction, the common law principle in the construction of a statute altering or modifying a common law rule, or impairing a recognized legal right, viz. that such statute is not to be deemed as intended to alter or modify the common law rule, or impair the right, any further than the express words of the statute demand.

If the legislature have the power assumed by passing the

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act in question, it must be under the general grant of legislative power in the constitution, or under the provision (*art. 10, § 2*) which expressly gives the legislature power to provide for the election or appointment of all officers, whose election or appointment is not provided for by the constitution, and all officers whose offices should thereafter be created by law.

When the constitution grants a power, or enjoins the performance of a duty, it is useless and nugatory for the legislature to do the same thing; for the constitution is supreme. The constitution and the act in question, both say that certain applicants shall be admitted to practice as attorneys, &c. The constitution leaves nothing to be ascertained and passed upon judicially, except the qualifications of the applicants. It is very clear, therefore, that the act cannot have, and was not intended to have, any other or further force or effect, than to confer on the faculty of law of the university the discretionary or judicial power of ascertaining and passing upon the qualifications of the applicants, and to make the diplomas of the council of the university evidence of the sufficiency of their qualifications, instead of the license or diploma of the court.

Now it will hardly be claimed that the legislature had the right to confer this power, under the general grant of the power of legislation. The general provision before adverted to, (*art. 10, § 2*), giving express power to the legislature to provide for the appointment or election of all officers whose appointment or election is not provided for by the constitution, would go to show that the right to pass the act could not be claimed under the general grant of legislative power. By the very terms of the provision in article 10, section 2, it does not give the right, if the appointment of attorneys &c. is provided for in section 8 of article 6. We have given our reasons for thinking that the last mentioned section, construed in connection with sections 3 and 5 of the same article, declaring and confirming the general jurisdiction of the court, and limiting the powers of the legislature over its jurisdiction and proceedings, do give to or confirm in the court the right of

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appointment and the exclusive power of ascertaining, through a committee of its own or otherwise, the qualifications of all applicants.

If we are right in our views of the questions, it follows that the legislature had no power to pass the act in question. If the power is in the court, it is a public trust; and the court has no right to surrender it; or the legislature to assume it, or confer it on any committee, person or officer, constituted or appointed by it.

In this day of easy legislation and of omnipotent majorities, it is the duty of this court to ward off all unauthorized attacks by the legislature on the legitimate powers or jurisdiction of the court.

We do not say that we have not the *power* to consider the diplomas, conferred on the applicants under the act, sufficient evidence of their qualifications, and to admit them on furnishing the evidence of citizenship, age, &c., required by the second rule of the court; or, if thus admitted and licensed by the court, that their right to practice could be questioned on the ground of the unconstitutionality of the act. An imperfect or improper exercise of a power of appointment may not in all cases affect the appointee's title. But we do intend to say that, in our opinion, the legislature had no right to declare that the diplomas, conferred under the act, *shall* be sufficient evidence of the requisite learning and ability of the applicants; and *shall* entitle them to admission, either with or without the evidence of moral character, citizenship and age required by the second rule of the court; or with, or without, evidence of their attendance in the university, and of their study of the law elsewhere, for the period or terms mentioned in the act; and that, in our judgment, they ought not to be admitted without submitting to the usual examination which they, or such of them as desire it, can have at an early day, by complying with the second rule of the court.

[NEW YORK GENERAL TERM, May 7, 1860. *Sutherland, Mullin and Leonard*, Justices.]

WILLIAMS vs. AYHAULT and CHAMBERLIN.

An action cannot be maintained, in the courts of this state, to enjoin and restrain the prosecution of an action commenced and pending in a court of a sister state.

A plea of a suit pending for the same matter, in a foreign state, or country, is no bar to an action here, either in equity or at law.

The *exceptio rei judicata* applies only to final judgments abroad, upon the merits of the action.

An action to recover the debt to secure which a mortgage is given, or even to foreclose a mortgage, and an action to compel a party to surrender a mortgage, to be canceled and discharged of record, are different actions entirely, and were never regarded or held to be actions for the same matter. *Per* JOHNSON, J.

The supreme court has the right and power, in a proper case, to decree a mortgage upon real estate void for usury, and to compel the party holding it, to surrender it up to be canceled, although the lands mortgaged lie in another state.

If the cause is one of equitable cognizance, and the parties are within the jurisdiction of the court, the court will exercise its authority, although the property in question lies beyond its jurisdiction.

Hence the court will decree the cancellation of a void mortgage, which is an apparent lien and cloud upon property situated beyond the jurisdiction of the court.

As a general rule, a party cannot come into a court of equity to have a usurious obligation surrendered up and canceled, if he has a perfect remedy at law. And if there are any circumstances in the case by reason of which it is difficult or impossible for him to obtain complete and perfect relief, against the usurious contract, or instrument, at law, he must state them in his complaint.

But in the case of a mortgage upon real estate, the necessity of coming into a court of equity, to have the instrument surrendered and canceled, is sufficiently apparent, without showing any reason, other than the fact that the mortgage has been executed and delivered, and placed upon record, if it is void from any cause not apparent upon its face.

In an action to compel a mortgagee to cancel and discharge of record a usurious and void mortgage which has been recorded, it is sufficient for the plaintiff to set out in his complaint the execution and delivery of the mortgage, upon his real estate, in pursuance of a usurious agreement, and that the same was duly recorded; without any reference to the question of a defense at law. SMITH, J. dissented.

Such a mortgage, being upon record, and apparently valid, though in fact void, is a cloud, which a court of equity should aid in removing.

If all the facts are alleged, which constitute a cloud upon the title, that will be regarded as sufficient, although the term cloud is not used in the complaint.

Williams v. Ayrault.

THE plaintiff, Williams, and the defendant Chamberlin, in the spring of 1854, entered into an agreement with the defendant Ayrault, to borrow of him a large amount of money, to enable them to make a purchase of land in Cleveland, Ohio, for which they were to pay interest at the rate of not less than 10, nor over 14 per cent per annum. The rate of interest was to be fixed when the final arrangement should be made for the loan. They desired Ayrault to take a share of one third or one fourth in the purchase, and he agreed to decide whether he would do so, by the 20th of June, 1854. On the 4th of April, 1854, he advanced in pursuance of this arrangement, \$15,000, for which Chamberlin and Williams gave their three notes for \$5000 each, with indorsers, payable 9, 12 and 15 months from date, with interest. At the same time, Chamberlin gave to Ayrault a contract, giving him a right to take one quarter of the purchase at any time previous to the 20th of June. Ayrault declined to take any interest, and on the 5th of July he made a further loan of \$12,000, and extended the time of payment of the former loan, so that the whole \$27,000 would become payable as follows; \$5000 on the 3d April, 1855; \$5000 on the 3d July, 1855; \$5000 on the 3d January, 1856; \$6000 on the 1st July, 1856; \$6000 on the 1st July, 1857. The three sums of \$5000 each were secured by the notes of Chamberlin and Williams, indorsed as before; and the two sums of \$6000 each were secured by like notes with indorsers in Cleveland. All of said notes were on interest. They also gave Ayrault, for making the loan and giving day of payment of said \$27,000, their own note without indorser for \$4000, payable in four years, with interest biennially. To further secure the payment of the money loaned, and the \$4000 note, Williams gave to Ayrault a mortgage on real property in Cleveland, which was recorded there. The securities were all made payable in New York, the rate of exchange being one half of one per cent in favor of that place, and this was done to give Ayrault another half per cent beyond lawful interest. The plaintiff insisted that by reason of the usurious agreement

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as appears from the complaint, was to have the mortgage and notes mentioned in the complaint declared void for usury and to have the defendant Ayrault decreed to give up the mortgage to be canceled. If the plaintiff was entitled to this relief, the action should have been retained and tried, although he was not entitled to the injunction. If he had one good cause of action, that was enough to prevent a dismissal or nonsuit, when the case was brought on for trial. There can be no doubt whatever of the right and power of this court, in a proper case before it, to decree a mortgage upon real estate void for usury, and to compel the party holding it to surrender it up to be canceled, although the lands mortgaged lie in another state. If the cause is one of equitable cognizance, and the parties are within the jurisdiction of the court, such court will exercise its authority, although the property in controversy lies beyond its jurisdiction. This power has been frequently exercised to compel parties to perform their contracts specifically, and execute conveyances of lands in other states, and also to set aside fraudulent conveyances of lands in other states. And the same principle would clearly authorize the cancellation of a void mortgage, which was an apparent lien and cloud upon property beyond the jurisdiction of the court. (*Mitchell v. Bunch*, 2 *Paige*, 606. *Mead v. Merritt*, *Id.* 402. *De Klyn v. Watkins*, 3 *Sandf. Ch.* 185. *Massie v. Watts*, 6 *Cranch*, 148. See also notes to *Penn v. Lord Baltimore*, 2 *Lead. Eq. Cas. part 2*, where most of the American cases are collected.)

The only question, as I conceive, as to the right of the plaintiff to maintain the action, which presents any difficulty, is whether facts enough are alleged in the complaint to make out a case of equitable cognizance. It is not every case of an usurious obligation which will authorize a party to it to come into a court of equity, to have it surrendered up and canceled. As a general rule, he cannot come into a court of equity for that species of relief, if he has a perfect remedy at law. And if there are any circumstances in the case by reason of which

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it is difficult or impossible for him to obtain complete and perfect relief, against the usurious contract, or instrument, at law, he must state them in his complaint, in which such relief is sought. (*Perrine v. Striker*, 7 Paige, 598. *Morse v. Hovey*, 9 id. 197. *Folsom v. Blake*, 3 Edw. Ch. 442.) These cases, however, it is to be observed, are all cases of promissory notes; and there is great reason for holding, in such cases, that the special reason why a party could not have complete relief, in his defense to an action at law, before coming into a court of equity, should be set out. But in the case of a mortgage upon real estate it seems to me the necessity of coming into a court of equity, to have the instrument surrendered and canceled upon the record, is sufficiently apparent without showing any reason, other than the fact that the mortgage has been executed and delivered, and placed upon record, if it is void for any cause, not apparent upon its face. The statute authorizes such a proceeding, without any qualification, and no court can fail to see that a successful defense, to an action at law to recover the debt, would still leave the mortgage upon the record an apparent incumbrance. In *Ward v. Dewey*, (16 N. Y. Rep. 519,) Selden, J. in his opinion, says, "in cases where the title to real estate is, or may be affected, it seems never to have been regarded as a sufficient objection to a bill seeking relief, in equity, that the complainant has a perfect legal defense." The distinction in this respect between mere personal obligations and those which affect real estate, is entirely settled, in England. And these decisions are recognized as sound law by the learned justice in his opinion in the case above cited. (*Byne v. Vivian*, 5 Vesey, 604. *Byne v. Potter*, Id. 609. *Bromley v. Holland*, 7 id. 3.) It seems to me this distinction is founded in sound reason, and ought to prevail here, especially in view of the provisions of our statute. If these views are correct, it was sufficient for the plaintiff to set out in his complaint the execution and delivery of the mortgage upon his real estate in pursuance of the

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usurious agreement, and that the same was duly recorded, without any reference to the question of a defense at law.

It is urged by the defendants' counsel, as a sufficient objection to the maintenance of the action, that there is no specific allegation in the complaint, that the plaintiff was, at the time of the execution and delivery of the mortgage, the owner of the mortgaged premises, or that he is now the owner thereof. But this, I think, sufficiently appears from the complaint. It is distinctly alleged that the plaintiff owned the property mortgaged, at the time of making the corrupt agreement, and the mortgage is referred to and made part of the complaint, by annexing a copy thereof as a schedule. From this copy it appears that the plaintiff covenanted in the mortgage that he was, at the time of its execution and delivery, the owner in fee of the premises therein described. It is true that it is nowhere alleged, in terms, that the plaintiff, at the time of the commencement of the action, held the title to the mortgaged premises. But the law will presume that the title remained as it was at the time the mortgage was made, until the contrary is in some manner alleged or proved. No such defense is interposed in the answer, and I think it was not a valid objection to the plaintiff's proceeding with the trial of his action, at that stage, upon the issues made by the pleadings. It can scarcely be pretended that the facts stated in the complaint failed to constitute a cause of action, by reason of the absence of that distinct averment. The dismissal at the special term was not, I apprehend, put upon any such ground, but upon the ground that the complaint failed to show that the plaintiff had not a perfect remedy, by a defense to an action brought to recover the debt. If this was unnecessary, as I think it most clearly was, in an action to compel a mortgagee to cancel, and discharge of record, an usurious and void mortgage which has been recorded, the decision at special term was erroneous.

The complaint, upon any fair and reasonable construction, shows the execution of the mortgage by the plaintiff, upon his

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real estate, and its delivery to the defendant, who placed it upon record, in pursuance of an agreement clearly usurious, and that the defendant still holds the same and claims to enforce it, as a lien and incumbrance upon the plaintiff's real estate. Being upon record, and apparently valid, though in fact void, it is a cloud which a court of equity should aid in removing. All the facts are alleged, which constitute a cloud upon title; and that must be regarded as sufficient, although the term cloud is not used in the complaint. Taking the facts alleged in the complaint to be true, which must be assumed for the purpose of considering the question here presented, the cloud is quite apparent to the court. I am of the opinion, therefore, that the complaint was improperly dismissed, and that the plaintiff had the right to have the issues made by the pleadings tried at the special term, and the case determined upon the evidence, as well as the pleadings. It follows that there must be a new trial, with costs to abide the event.

KNOX, J. concurred.

E. DARWIN SMITH, J. dissented.

New trial granted.

[CAYUGA GENERAL TERM, JUNE 4, 1860. *Smith, Johnson and Knox, Justices.*]

 WINANS and HARROWER vs. PEEBLES and BURDICK.

Since the acts of 1848 and 1849 "for the more effectual protection of married women," a married woman can execute a valid conveyance of her real estate, to her husband, which will bind her heirs.

If such a conveyance is not valid at law, it is good, and may be sustained, in equity.

It is not essential to the validity of a deed, in law, that the consideration specified in it, or any portion of it, should be in fact paid. It is sufficient if it is stated in the deed to have been paid.

SEVERAL years prior to the passage of the "act for the more effectual protection of the property of married wo-

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men," passed in 1848 (*Laws of 1848, ch. 200*) and amended in 1849, (*Laws of 1849. p. 528,*) Catharine M. Winans, being a widow and having two children by her former husband, married Corbet Peebles, one of the defendants in this action. On the 15th March, 1851, William Steele, the father of Mrs. Peebles, gave to her husband \$825, with directions to purchase with it a lot of land of about 40 acres, and take a conveyance directly to her. It was claimed and found that this was done with the understanding on the part of Steele and Mrs. Peebles, that after the death of the former, the latter should convey to her husband. The land was purchased with the money furnished by Steele, and the conveyance made to Mrs. Peebles, with the consent and by the agency of her husband. On the 28th day of June afterwards, Mrs. Peebles by the usual common law conveyance, a warranty deed, conveyed the same premises to her husband, expressing a consideration of \$825, which it appears was not in fact paid. Mrs. Peebles was then sick of a disease which terminated in her death on the 11th day of the following July. There were no issue of her marriage with the defendant Peebles. She left surviving her, her son John C. Winans and her grandson William B. Harrower, the son of her deceased daughter by marriage with Levi B. Harrower, also deceased, and which son and grandson were her only heirs at law. It did not appear either by the deed to Mrs. Peebles, or the deed by her to her husband, that she was a married woman. This action was brought by these heirs to set aside that conveyance as void; the question being whether a married woman can execute a valid common law conveyance of her real estate to her husband, which shall bind her heirs.

The action was tried at a circuit held in Steuben county in July, 1859, before Justice JOHNSON, without a jury; who found the facts to be as above stated, substantially, and found the following conclusions of law: 1. That the said conveyance by Catharine M. Peebles to Corbet Peebles was a good and valid conveyance, and vested in him a perfect title at law,

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notwithstanding she was, at the time of such conveyance, the wife of the said Corbet Peebles. 2. That even if such conveyance was not a valid conveyance at law, the same was good and might be sustained in equity. To which decisions the plaintiffs' counsel excepted.

The following opinion was delivered by the judge, on deciding the case at special term :

JOHNSON, J. "The first question presented in this case is, whether the conveyance in question is valid under the act of 1849, amending the act 'for the more effectual protection of married women.' By this act 'any married female may take by inheritance or by gift, grant, devise or bequest from any person other than her husband, and hold to her sole and separate use, and convey and devise real and personal property and any interest or estate therein, and the rents, issues and profits thereof, in the same manner and with the like effect as if she were unmarried, and the same shall not be subject to the disposal of her husband nor be liable for his debts.' It will be seen that under this act the right of acquisition is limited, so that property can be taken by the wife from persons other than her husband only. But the right of alienation by her is general, without limit or qualification of any kind. She may convey and devise 'in the same manner and with the like effect as if she were unmarried.' Had she been unmarried at the time of the grant, it is admitted she might have conveyed to the defendant, and the conveyance would have been effectual to vest in him the title. It is also conceded that, being a married woman at the time, had the defendant been some person other than her husband, the conveyance would have been valid. Now as the statute authorizes a married woman to hold and convey, as if she were unmarried, and gives the same effect to her deed, it is difficult to see why the deed in question is not necessarily valid, notwithstanding the defendant's relation of husband to the grantor. It must be admitted that the language of the act is broad and comprehensive

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enough to authorize and give effect to such a conveyance. It invests the wife with all the rights and powers of disposition incident to ownership and possession. It seems to remove from her, in reference to such property, not partially but entirely, all the disabilities and restraints of coverture, and to place her, in respect to alienation, upon the same footing, precisely, as though she had never contracted the marriage relation.

It is claimed, however, that although such a conveyance may come within the letter of the statute, it is not within its spirit and intent. And it was held by the late Justice Barculo, at special term, in the case of *Graham v. Van Wyck*, (14 Barb. 531,) that notwithstanding the general and unqualified terms by which the power is given in the statute, it was only intended to confer upon married women the right to convey to persons other than their husbands. This decision being at special term is not binding as authority, and with all proper respect for the opinions of the eminent judge, after a full and careful examination of the whole subject of the rights of married women, in reference to their separate property, at the time of the passage of the acts of 1848 and 1849, and contrary to my first impressions, I have come to the deliberate conclusion that the legislature designed to give the powers as fully and unqualifiedly, in the enactment, as its terms import, and that no such exception as that contended for is implied in any of its provisions, or was intended by its framers. I shall assign some of the principal reasons which have led me to this conclusion.

1. The act proceeds upon the assumption that a female is entirely competent, in respect to qualification, to manage, control and dispose of her property after marriage as well as before, without any aid, advice or assistance from her husband. And its provisions have special reference to the right of acquisition, enjoyment and disposition of property by her, as her separate property, independent of her husband. The right, as we have seen, to take from others, expressly excepts

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the husband. The right to enjoy is secured to her, to the entire exclusion of her husband. It is neither subject to his disposal nor liable for his debts. But the right to convey or devise is without exception. Now had the legislature intended to limit the right of conveyance by her, to persons from whom she was authorized to take, we should have the right to expect that such limitation would be expressed, especially in view of the careful limitation upon the right to take. The unavoidable inference is that the legislature intended in effect, as well as in words, to confer an unlimited right of alienation.

2. There was no reason for any such restriction. The voluntary conveyance by a wife, to her husband, of her separate property, was not one of the mischiefs which the statute was intended to remedy. The mischief to be remedied was the husband's power over his wife's estate, to dissipate and squander it, and subject it to the payment of his debts. It was the right which the law gave the husband to his wife's property, and not the right she saw fit to give him voluntarily, which the statute aimed to abolish. It took from him all right of disposal, and conferred the unrestricted right upon her. The policy obviously was to allow the wife to do what she would with her own, the same precisely as any other individual, and to secure to her all the incidents pertaining to the ownership of property by others. Hence the provisions of the second section of the act of 1849, authorizing a trustee holding property for a married woman to convey it to her upon her written request, and upon a certificate of a justice of the supreme court, that he had examined the condition of the property, and made due inquiry into the capacity of such married woman to manage and control the same. It was the obvious design to do away, as far as practicable, with all the useless and cumbersome machinery of uses and trusts, in the possession, enjoyment and disposition of property by a married woman.

3. It was clearly no part of the scheme, or policy, of the act to abridge or take away any of the rights which the wife

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had previously enjoyed, in respect to the use or disposition of her separate estate. It aims to enlarge her rights, not to curtail them. The construction contended for would, I apprehend, take away a right which a wife has always enjoyed, in this state at least, of bestowing her separate estate upon her husband. True she could not, before this statute, convey it to him directly, because of her coverture, but she could convey it to a third person for the express purpose of having it conveyed to her husband by such third person. And in making such conveyance to such third person it was not necessary for her husband to join in the conveyance. This, though formerly doubted, is now settled. (*The Albany Fire Ins. Co. v. Bay*, 4 Comst. 9.) Such a conveyance has always been held good at law, and not to interfere with the technical common law rule, that a wife could not make a conveyance to her husband. (*Meriam v. Harsen*, 2 Barb. Ch. Rep. 232. *Jackson v. Stevens*, 16 John. 110.)

Our statutes, as the legislature well knew, have always authorized a married woman to convey her separate real estate by deed, by the observance of certain prescribed conditions. The legislature also knew that a married woman through the medium of a trustee of her own creation, could convey her real or personal estate to her husband, and it is certainly not unreasonable to suppose that they intended, when they said she might convey in the same manner and with the like effect as if she were an unmarried female, to enable her to do directly what she might do indirectly before. This is no novel power conferred by the legislature upon married women, and whoever regards it in any such light is liable to be widely and fatally misled. It only changes the form of executing the identical power over her separate estate which she possessed and could exercise before, both at law and in equity. Originally, at common law the wife could neither own nor enjoy property separately from her husband. Whatever belonged to her before coverture, or came to her afterwards, passed absolutely to the husband, or fell under his exclusive dominion. But as civilization

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and refinement advanced, and the true position of woman as a member of society came to be better understood and acknowledged, such a rule was found to be intolerable, and it has accordingly from time to time been modified by legislation, and the interposition of courts of equity, until the husband has been deprived of all right to the property of his wife, and all dominion over it, except by her free or voluntary consent or grant. No valid argument, as I conceive, can be drawn in favor of the implied limitation upon the right of conveyance contended for, from the exclusion of the husband from the list of persons from whom the wife may take property to be held by her as her separate property. If any argument is to be drawn from that exception, it seems to me it must be one favoring the opposite conclusion. The obvious purpose of that exception was to prevent a husband in that way putting his property out of his hands to the prejudice of his creditors. And the fact, as has been before suggested, that the wife is prohibited from taking from her husband while no restraint is placed upon her right and power of alienation, is a strong circumstance to show that no such restraint was intended. We are to assume that the legislature understood the existing rules of law and equity, and the necessary effect of the power to a married woman to convey and devise as if she were unmarried.

4. There is no rule for construing statutes, that I am aware of, which would authorize the courts to place such a restriction upon the wife's right of disposition. When the statute gives her authority to convey and devise her separate estate in the same manner and with *the like effect* as if she were unmarried, without any qualification, courts are bound to give to any conveyance made by her in due form the same effect they would give were she unmarried. If courts may say that certain conveyances made by her, of her separate estate, are ineffectual and void by reason of her coverture alone, they simply repeal the statute. To say that the legislature did not intend what they have expressed in the clearest and most un-

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equivocal terms, is to set aside or evade their authority. The language is so clear and explicit that there is no room for interpretation or construction, and unless we have the right to infer that the legislature did not intend to make the power so extensive, because we may happen to think it would have been unwise in them to do so, notwithstanding their plain and direct expression to the contrary, the question of intent has no place in the discussion.

5. That the legislature intended to make a complete and radical change in the law, in respect to the rights of enjoyment and disposition by a married woman of her separate property, is not, and cannot be successfully questioned. And it seems to me very plain that the inevitable effect of giving a married woman power to convey and devise her separate property in the same manner, and with the like effect as if she were unmarried, is to enable her to convey directly to her husband, as effectually as though he were not her husband. No one will pretend that she could do so at common law. But the only reason was that the common law regarded husband and wife as but one person. It was the unity, both of person and interest, which prevented their contracting with, or conveying directly to each other. And although in the progress of things the wife was first by the process of fine and recovery enabled to alienate her separate estate at law, and subsequently by statute, it was still as a married woman that she made the disposition, the law still treating her to a certain extent as covert, and a unit with her husband. But this statute separates the wife entirely from the husband, and completely dissolves the theoretical unity to all intents and purposes as respects the possession, enjoyment and disposition of her separate estate. Since this statute the wife, in respect to her separate estate, stands at law precisely as she stood before in equity, a distinct and separate individual, capable not only of owning property in her own right, but of exercising and enjoying all the incidents of ownership, free use and disposition.

Equity, whose function, as an able writer has graphically

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said, is 'to make the law work justice' without any aid from legislation, first devised a scheme by which married women were enabled to hold separate property and thus to protect themselves from the consequences of the improvidence, misfortunes or misconduct of their husbands. This was by the introduction of the doctrine of separate use and the power of disposition by appointment. This power might be vested in the female by the grantor of the estate, or it might be reserved by her, by agreement before marriage with her husband. In respect to such property held to the separate use of the wife, she was always regarded as a *feme sole*, and where she had the power of disposition, she could in equity dispose of it to her husband as well as to any other person, they being regarded in equity as they are in fact, two distinct persons; and this she could do directly and without the intervention of trustees. (*Story's Eq.* § 1395. *Bradish v. Gibbs*, 3 *John. Ch. R.* 523. *Methodist Epis. Church v. Jaques*, *Id.* 78; *S. C.* 17 *John.* 78. *Wallingford v. Allen*, 10 *Peters*, 583.) The only difference a court of equity made between a disposition by the wife to a stranger, or to her husband, was that the court would scrutinize the latter more closely to see that no undue influence had been exercised by the husband. And they always exercised the like care and caution when she conveyed to the husband through the medium of a third person. The reason why she was allowed in equity to make a disposition of her property to her husband was, that in respect to such property she should be regarded as a *feme sole* notwithstanding her coverture. The same consequences must, I think, flow from the statute which gives a married woman power to convey her separate estate, and the same effect to her conveyance as though she were a *feme sole*. And I can have no doubt that the legislature intended to place the legal rights of a married woman upon the same footing, in this respect, with her then existing rights in equity. No power of disposition can now be necessary, other than what the statute confers. The statute is the general power, and renders all special powers unnecessary.

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My conclusion, therefore, is that the conveyance in question is a valid conveyance, and vested in the defendant a perfect title at law. It is not essential to the validity of a deed, in law, that the consideration specified in it, or any portion of it, should be in fact paid. It is sufficient if it is stated in the deed to have been paid. (*Meriam v. Harsen*, 2 Barb. Ch. 232.)

If, however, I am mistaken in this conclusion, I am clearly of the opinion that the deed may be sustained in equity. The plaintiffs come into equity to have the deed set aside, and must show that the conveyance is not only void in law, but that in equity it ought not to be upheld. Equity has always upheld conveyances which were void at common law, where equity and justice demanded it. And this, whether the estate conveyed were a legal or an equitable estate. There are no facts established by the evidence in this case, which would justify a court of equity in setting aside this deed as unjust or inequitable. On the contrary, the evidence shows quite satisfactorily, that the conveyance was the voluntary act of the wife, and that she made it in pursuance of a request from her father, from whom she received the money with which the land was purchased, and her promise to him that she would convey it to her husband after his, her father's, decease. The tendency of all the evidence in the case is to disprove any undue influence on the part of the husband. I shall not, however, enlarge upon this branch of the case, but content myself with merely stating my conclusions.

I have not failed to study with care and interest the very learned, ample and thorough brief and points presented by the plaintiff's counsel. But the view I have taken of the case has rendered it unnecessary to examine the numerous and ingenious positions there taken, in detail, or to comment upon the numerous authorities cited in their support. The case is new, and one of great interest, in view of the principle involved, and it is to be hoped may result in settling the law applicable to such cases, after a careful review of my judgment and opinion in the premises.

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The defendants must therefore have judgment in the action, for their costs."

Judgment was rendered accordingly, and the plaintiffs appealed.

Geo. T. Spencer, for the appellants.

J. Herron, for the respondents.

The decision made at special term was affirmed at a general term held at Auburn, June 5, 1860, and the foregoing opinion adopted, as the opinion of the court. Present, *Smith*, *Knox* and *Johnson*, Justices.

COLBURN vs. WOODWORTH.

Where a party enters into a contract to work for another for a term of years, at a specified sum per annum, payable quarterly, and is discharged by his employer before the end of the term, he has three remedies, either of which he may pursue at his election. 1. He may, the moment the contract is broken, bring a special action to recover the damages arising from the breach; 2. He may treat the contract as rescinded, and immediately sue on the *quantum meruit*, for the work actually performed; or 3. He may wait until the termination of the period for which he was hired, and claim as damages the wages agreed to be paid, by the contract.

But a party cannot, under such circumstances, pursue all these remedies, in separate actions. An action upon one, and judgment upon it, will operate as a bar to any further action.

Thus, if a person, hired for three years, is discharged by his employer during the second quarter, and sues to recover for arrears of wages, and damages for the breach, and recovers a judgment for one quarter's wages, this will be a bar to a second suit, upon the same contract, for wages of the subsequent quarters of the first year and damages.

And this, notwithstanding the referee decided, in the former action, that the plaintiff could only recover one quarter's wages, and the court ordered judgment in accordance with such decision.

If a party submits his claim, to be passed upon, this will operate as a bar to a subsequent suit, even though the decision of the court thereon be erroneous; provided the cause of action has then accrued.

The error, if any, must be corrected in that action, by review of the verdict or judgment; and not by a new action for the same cause.

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ACTION brought to recover *wages*, under a contract to work for the plaintiff for three years, from August 1st, 1857, payable quarterly, and *damages* for a breach of the contract by the defendant, in discharging the plaintiff from his employment, on the 26th December, 1857, without cause. The defendant pleaded and proved that in January, 1858, after the plaintiff was discharged, he commenced an action in this court against the defendant, and in his complaint claimed one quarter's wages, and damages for the wrongful discharge on the 26th of December, set forth in the present complaint. That issue was joined and the cause referred, and the referee reported in favor of the plaintiff, for one quarter's wages, (less the value of his lost time and payments made to him,) and "that the second quarter of the contract not having expired when the suit was commenced, he is not entitled to recover for the payment of that in this action." The plaintiff had judgment on the report. The court, on the trial in this case, rejected evidence offered to show that the plaintiff had been ready to perform, and had been out of employment since his discharge, and granted a motion for a nonsuit, on the ground that the former action was a bar to the present claim. The plaintiff's counsel excepted, and the court ordered that the exceptions be heard at the general term.

J. C. Cochrane, for the plaintiff.

H. R. Selden, for the defendant.

By the Court, JOHNSON, J. The only question here presented is, whether the former action, brought by the plaintiff, to recover damages against the defendant for a breach of the same contract, is a bar to this action. The plaintiff, in the former action counted upon a breach of the contract by the defendant, in discharging him from further work and labor, under the contract, and refusing to allow him to work any longer under the same, and claimed damages by reason of such

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breach, and for loss of employment and inability to obtain other employment on terms as favorable as he had secured by the agreement.

The plaintiff in this action avers the same identical breach, and the right of action is predicated entirely upon it. It is true, that in addition to his other damages, he now claims for wages according to the contract, for the three quarters of the year ending on the 1st of August, 1858. But this is not for services rendered under the agreement, but the claim for compensation is founded upon the alleged offer and readiness of the plaintiff to work according to the agreement, and the defendant's refusal to allow him to do so. This, however, makes no difference in the nature of the action. It is still founded upon the breach of the contract by the defendant, and not upon its performance by the plaintiff. It is entirely clear that the two causes of action are identical, however the measure of damages claimed may be varied. On the former trial, the referee, as it appears, found as matter of fact that the defendant had wrongfully put an end to the contract as alleged in the complaint, without any fault on the part of the plaintiff, but held nevertheless, as matter of law, that the plaintiff was not entitled to damages, for such breach, but must wait until another payment became due by the terms of the agreement, before he could maintain an action for such cause. In this the referee was clearly mistaken. A party discharged under such circumstances has three remedies, either of which he may pursue at his election. First, he may bring a special action to recover the damages arising from such breach; and this remedy he may pursue the moment the contract is broken. Secondly, he may treat the contract as rescinded, and immediately sue on the *quantum meruit*, for the work actually performed. Or, thirdly, he may wait until the termination of the period for which he was hired, and claim as damages the wages agreed to be paid by the contract. (*See 2 Smith's Lead. Cases*, p. 27, notes to *Cutter v. Powell*.) It is manifest, however, that a party under such circumstances could not pursue

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all these remedies, in separate actions. An action upon one, and judgment upon it, would operate as a bar to any further action. This necessarily results from the doctrine that a party cannot split up a demand, and maintain several actions for the same cause. (*Fish v. Folley*, 6 *Hill*, 54. *Bendmagle v. Cocks*, 19 *Wend.* 207.)

It is claimed on the part of the plaintiff, that the referee in the former action, having decided that no action could be maintained, for the cause alleged, and judgment having been entered upon his report in accordance with such decision, it cannot operate as a bar to this action. But the rule is otherwise. If the party submits his claim to be passed upon, it will operate as a bar, if the decision is erroneous, the same as though it were not, if his cause of action has then accrued. The error must be corrected in that action, by review of the verdict or judgment, and not by a new action for the same cause. (*Brockway v. Kinney*, 2 *John.* 210. *Platner v. Best*, 11 *id.* 530. *Phillips v. Berick*, 16 *id.* 136. *Cowen & Hill's Notes*, 842, 3, 956, 7.)

There can be no doubt that the cause of action here alleged is in its nature indivisible. All the damages which the plaintiff could under any circumstances recover, were such as flowed directly and necessarily from the breach, which is the sole cause of action. The contract is not in the nature of a continuing covenant, like a covenant running with land. It is idle to suppose that when such a contract has been once put an end to, by one party, entirely, though without sufficient cause, and the other party has brought his action for the damages occasioned by such breach, and had the judgment of the court upon his claim, the contract still remains in force, so as to entitle such other party to the compensation provided for in case of its performance. When the action is brought to recover damages, for a breach of that character, it is necessarily an election, on the part of the party prosecuting it, to consider the contract at an end, so far at least as performance on his part is concerned. The action operates as a rescission by him as to

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further performance. If the party thus situated brings his action before the entire measure of damages has been filled, or before the damages have all become known, so as to be susceptible of proof, it is his folly, or misfortune. He cannot sever them, and recover part in one action, and the residue, when discovered, in another. But the question as to what damages the plaintiff ought to recover as his compensation, does not arise here. That question necessarily arose in the other action, and should have been there determined. That action being a bar, the nonsuit was properly granted.

New trial denied.

[CAYUGA GENERAL TERM, June 4, 1860. *Smith, Knox and Johnson*, Justices.]

FRANCES A. BROWN, by Isaac C. Brown, her guardian, *vs.*
THE NEW YORK CENTRAL RAIL ROAD COMPANY.

Where a person, while traveling in a public stage coach, receives an injury, in consequence of the carelessness and negligence of another, and brings an action to recover damages for the injury, the plaintiff is chargeable with the negligence, if any, of the driver of the stage; and, for the purposes of the action, such negligence of the driver is to be regarded as the negligence of the plaintiff.

Where it is not entirely clear, from the evidence, in such an action, that the negligence of the driver contributed to the injury, the case should be submitted to the jury, for their determination.

THIS was an action to recover damages for injuries sustained by the plaintiff in consequence of the carelessness and negligence of the defendant, its servants and agents. The plaintiff, on the 21st of October, 1858, had employed one Thomas, the owner and driver of a stage coach running from Albion to Batavia, to carry her to Elba, a place between those villages, and had taken her seat in the stage with other passengers. The usual route was across the track of the defendant's rail road. The stage started at about ten o'clock in the morn-

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ing, which was about the time when a regular passage train usually passed over the rail road. On this occasion the conductor, in order to drop a car at Albion, had divided the train into three parts, with one or more brakemen on each section. Thomas knew of the passage of this train at that hour. On approaching the rail road, he discovered the train, which was moving at the rate of from eight to twelve miles an hour, and stopped his horses. After the main train had passed, that is, the engine and ten or twelve freight cars attached, he started again, and went to within three rods of the track, when he saw a single car approaching, and stopped again. When that car had passed, not seeing any others, he again started ahead, with the view of driving across the track. He immediately discovered two other cars coming. Instead of stopping and jerking his horses back, he raised his whip, hit his horses, and attempted to cross the track ahead of these two cars, and the hind part of his carriage was struck by the cars. The alleged injury occurred in this way.

The judge was requested to nonsuit the plaintiff on the grounds: 1. That the plaintiff had failed to show that the injury complained of was occasioned without fault on her part. 2. That the evidence showed that Thomas, who was employed by the plaintiff, was himself negligent, and that his negligence contributed to produce the injury. 3. That the proof failed to show negligence on the part of the defendant. 4. That upon the undisputed facts of the case, the plaintiff was not legally entitled to recover. The motion for nonsuit was denied, and the judge submitted it to the jury as a question of fact, to determine, 1. Whether Thomas, the driver of the stage, was guilty of negligence in attempting to cross the defendant's road under the circumstances disclosed by the evidence. 2. Whether the defendant was guilty of negligence, in passing the crossing with the cars detached from the engine. 3. Whether Thomas having seen the single car detached from the main train, it was not a matter of prudence for him to look and ascertain if there were not other detached cars, before attempting to cross

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the track. The defendant's counsel, in respect to each of these propositions, claimed that they should be decided by the court as questions of law, and duly excepted to the ruling of the judge submitting them to the jury.

The jury found a verdict in favor of the plaintiff for \$500; and the defendant, upon a case, moved for a new trial.

Benedict & Martindale, for the plaintiff.

O. H. Palmer, for the defendant.

By the Court, JOHNSON, J. It is insisted by the defendant's counsel, that the carelessness of the stage driver contributed to the injury sustained by the plaintiff, and that the case, on this point, is so clear, upon all the evidence, that it ought not to have been submitted to the jury, but should have been determined by the court, as a question of law.

The plaintiff's counsel contends that the plaintiff is in no respect responsible for the carelessness of the driver of the stage, in which she was riding at the time of the injury, it being a public conveyance for all persons, and the plaintiff only an ordinary passenger. To sustain this position the counsel refers us to the case of *Knapp v. Dagg*, (18 How. Pr. R. 165.) That was a private carriage, in which the plaintiff was riding with her brother, and the judge at the circuit held that she was not chargeable with the negligence of the driver, with whom she was riding. It must be admitted that that was a stronger case against the plaintiff than this, where the driver was exercising a public employment as a carrier of passengers. But that was a decision upon a trial at the circuit, and is not entitled to any great weight as an authority. And with all respect, I am entirely satisfied that the decision is not law. This question, of passengers who have received injuries while traveling in public conveyances, such as omnibuses and vessels, being chargeable with the negligence of the persons in charge of such conveyances, in actions brought by them to re-

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cover for such injuries, was very fully and thoroughly discussed, by the ablest counsel, before the common bench, in England, in the cases of *Thorogood v. Thorogood* and *Catlin v. Hills*, (65 *E. C. L.* 114,) and the judges unanimously held that the passenger bringing the action against the proprietors of the other carriage, or vessel, which directly caused the injury, was chargeable with the negligence of the person in charge of the conveyance in which he was riding, the same as though it were his own. The principle seems to be, that the passenger having selected his conveyance, and entered into a contract with the owner, to convey him safely, has a remedy against such owner, for any injury occasioned by the negligence of his servant, in managing and conducting such conveyance, and must take the consequences of any default of the servant or driver whom he thought fit to trust, as to all injuries, from other persons, during the passage. (*See also the case of Briggs v. The Grand Junction Railway Co.*, 3 *M. & W.* 244.) The judge at the circuit, however, placed the case in this respect, upon the true ground, and charged the jury that the negligence of the driver, if any, must be regarded, for all the purposes of the action, as the negligence of the plaintiff.

The only question is, whether upon the whole evidence it was so clear that the negligence of the driver contributed to the injury, that the case ought not to have been submitted to the jury. In view of all the facts and circumstances proved upon the trial, I am of the opinion that it was a proper case to be passed upon by a jury. It is not every case of negligence on the part of a plaintiff, which will preclude him from recovering for an injury occasioned by the negligence of the defendant. To have that effect, his negligence must be such that he might, with ordinary care, have avoided the consequences of the defendant's negligence. It is true that a person crossing a railway track is bound to use his eyes, and ears, to discover and avoid danger; and if he fails to do this, and receives an injury which he might otherwise have avoided, he will not be allowed to recover.

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But here, it is apparent that the driver was on the lookout. He first stopped to let the engine and train pass, and then started and stopped again to let a detached car which had been switched off pass, before approaching the track. He then started again, supposing only one car had been switched off, and got so near the track that the heads of the horses were over the rail, when he saw the other cars coming, which had also been detached from the train, about two rods distant. Under these circumstances I think it was a fair question for the jury, whether the driver exercised ordinary care and prudence, in starting his team the second time, after the single detached car had passed, without waiting to ascertain whether other cars had not also been detached, and were coming behind the single car; and also the question whether the driver used ordinary care and prudence, in attempting to cross the track, after he saw the cars, which immediately caused the injury, approaching. Every one knows that the most careful and experienced driver has not the same immediate control over the motions and speed of his team, however safe and manageable, that a footman has over his own, when approaching a railway track, where trains are likely to pass. The driver whose attention is necessarily more or less directed to his team, has not the same opportunity to observe every thing which may be approaching. And it is quite obvious that in a given position it might be the height of care and prudence, in a driver, to attempt to cross with his team, when it would be inexcusable negligence and rashness in a footman to do so. All these were questions of fact which were submitted to the jury, as appears from the case, with great care and fairness; and as we think it was not a case for a nonsuit, a new trial must be denied.

[CAYUGA GENERAL TERM, JUNE 4, 1860. *Smith, Knox and Johnson*, Justices.]

MCCARTNEY vs. BOSTWICK and others.

Where a grant for a valuable consideration is made to one person, and the consideration therefor is paid by another, no interest, legal or equitable, vests in, or results to, the latter, upon which a judgment and execution can attach.

The trust which in such cases — where a fraudulent intent is not disproved — results, under the statute, in favor of the creditors of the party paying the consideration, to the extent that may be necessary to satisfy their demands, is a trust which can only be enforced in equity.

A creditor at large cannot institute such a suit in equity, before the recovery of a judgment in our courts, and the return of an execution issued thereon unsatisfied.

A judgment recovered in another state does not constitute a sufficient basis for a suit in equity to enforce a trust in favor of the judgment creditor. The plaintiff must first sue upon such judgment, here, and recover a new judgment and issue an execution thereon, and have it returned unsatisfied, and thus establish the fact that he has exhausted his remedy at law.

A PPEAL from a judgment entered at a special term, upon demurrer to the complaint. The complaint alleged that during the year 1856, the plaintiffs were copartners, doing business as such in the city of St. Louis, in the state of Missouri, as wholesale grocers and dealers in wines and liquors. That, as such copartners, they sold, and from time to time delivered, on various credits, various amounts of groceries, wines, liquors and merchandise, during the years 1856 and 1857, to the defendant Albion W. Bostwick, who was then a resident of and doing business at Winona, in the (now) state of Minnesota. That on or about the 5th day of September, 1857, the plaintiffs and the said Albion W. Bostwick accounted together, of and concerning the said sales, and on such accounting the said Bostwick was found indebted to the plaintiffs in the sum specified in the notes, copies of which were annexed in a schedule; and that he thereupon made and executed the said promissory notes and delivered the same to the plaintiffs, who have ever since continued to be, and now are, holders and owners of the same. That at the time of obtaining said credits and of the making of said notes, Bostwick was the owner of and in the possession of a stock of gro-

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ceries, wines, liquors and merchandise, at Winona. That afterwards, and after the maturity of said notes, said Bostwick sold and exchanged the said stock of groceries, &c. to and with one Lemuel C. Porter, then of Winona aforesaid, but formerly of Moravia, Cayuga county, New York, who immediately thereafter entered into possession of the same. That a very large part of the consideration for such sale and transfer of said stock of groceries &c. to Porter, by said Bostwick, was the conveyance, by Porter to Bostwick, of a farm lying in Moravia aforesaid, consisting of about 150 acres of land. That the said stock of goods &c. so sold by Bostwick to Porter, was worth, at the time of said sale, the sum of \$5500, and that the value of said farm, at the time, was \$5000 and over. That afterwards, and in the month of April, 1858, Bostwick caused the conveyance for said land to be made and delivered by Porter and wife to Mollie M., wife of the said Albion W. Bostwick, so as to vest in her the legal title to the said land. That the said deed was so taken by her, upon the consideration aforesaid, without any consideration paid therefor by her. That afterwards, and in the month of June, 1858, the said Albion W. Bostwick, and Mollie M., his wife, made and executed their certain deed for said premises to Samuel W. Bostwick of Cadiz, Ohio, upon the nominal consideration, as expressed in the said deed, of \$4000; that no consideration was in fact paid by Samuel W. Bostwick for said conveyance; that the said Samuel W. is the father of the said Albion W., and was well acquainted with the fact that the deed from Porter and wife to said Mollie M. was without consideration paid therefor by her, and that the same was held in trust by her for the plaintiffs, as the creditors of Albion W., existing at the time of such conveyance to the extent of their said demands; that he was aware of the existence of the plaintiffs' demands against the said Albion W., and that he took the conveyance of the farm, charged with the equitable lien thereon of the plaintiffs, as such creditors. That on the 20th day of August, 1858, in the district court of the third

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judicial district, Winona county, Minnesota, the plaintiffs commenced a suit against the said Albion W. Bostwick, by the service upon him, personally, on that day, of a summons issuing out of said court in favor of the plaintiffs, in due form of law, which was duly served, and that such proceedings were had that on the 25th day of September, 1858, judgment was duly rendered in said suit against said defendants, upon the notes, for \$4181.68, and the judgment roll was filed in the clerk's office of said district court, and judgment duly docketed in the clerk's office of the said county of Winona, in the state of Minnesota. That afterwards, and on the 11th day of October, 1858, execution was duly issued upon said judgment to the sheriff of the said county of Winona, against the property of the said defendant, which was duly returned unsatisfied. That the said Albion W. Bostwick was, at the date of the said notes, and from thence hitherto has been, and now is, a resident of Winona aforesaid; that he is insolvent, and that he has no property within the state of New York, except the equitable rights in the farm at Moravia aforesaid, out of which to collect the judgment of the plaintiffs against him, above stated. That the said Mollie M. resides with her said husband at Winona, and that Samuel W. Bostwick resides at the town of Cadiz, in the state of Ohio. That Albion W. Bostwick paid the entire consideration for the land so conveyed by Porter and wife to Mollie M. Bostwick, and that she, the said Mollie M., paid no part thereof. That Samuel W. Bostwick was a voluntary grantee of the land, with notice of the above mentioned facts, constituting the said Mollie M. trustee of the creditors of her husband as aforesaid, and that they are remediless, except by and through the equity powers of this court the said deeds shall be declared fraudulent as to these plaintiffs, to the extent of their said judgment and costs, as such creditors. Wherefore the plaintiffs demanded judgment, that the deed from Porter and wife to Mollie M. Bostwick be declared fraudulent, as to the plaintiffs, to the extent of their judgment and costs; and that the deed from Albion

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W. Bostwick, and Mollie M. his wife, to Samuel W. Bostwick be declared fraudulent as to these plaintiffs, to the like extent; and that the said Mollie M. Bostwick and the said Samuel W. Bostwick, or one of them, be declared to be trustees, or a trustee of the plaintiffs, as such creditors, to the extent aforesaid; and that the land in the said deeds described, or so much thereof as shall be necessary to pay the judgment and costs, be sold, and that out of the avails thereof the said judgment be paid, together with costs.

To this complaint the defendant Samuel W. Bostwick demurred, and assigned the following causes of demurrer:

First. That the complaint did not state facts sufficient to constitute a cause of action against him. Second. That the plaintiffs are creditors at large, without judgment against either of the defendants. Third. That the complaint does not show that the plaintiffs have acquired any lien on the lands and premises mentioned in the complaint, or that they have any right to question the validity of the transfer of said lands and premises to Samuel W. Bostwick. Fourth. That the defendant Samuel W. Bostwick is not a proper party to this action.

The judge, at special term, ordered judgment for the defendant S. W. Bostwick, on the demurrer; with leave to the plaintiffs to amend on payment of costs. The plaintiffs appealed.

Wm. Allen, for the plaintiffs.

George Rathbun, for the defendants.

By the Court, E. DARWIN SMITH, J. The case of *Garfield v. Hatmaker* (15 N. Y. Rep. 475) decides that where a grant for a valuable consideration is made to one person and the consideration therefor is paid by another, no interest, legal or equitable vests in or results to, the person paying the consideration, upon which a judgment and execution can attach. And

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it also decides that the trust which, under sec. 52, art. 2d, part 2, chap. 1 of the revised statutes, entitled "Of uses and trusts," (1 R. S. 728,) in such cases, where a fraudulent intent is not disproved, "results in favor of the creditors of the party paying such consideration, to the extent that may be necessary to satisfy their just demands," is a trust which can only be enforced in equity. The only question which remains in this case is whether a creditor at large can institute such a suit in equity before the recovery of a judgment in our courts and the return of an execution issued thereon unsatisfied. The plaintiffs have recovered a judgment upon their demands, in the state of Missouri; but that judgment is of no force here, except as a conclusive adjudication which precludes an inquiry into the merits of the original claim of the plaintiffs. Before it can be enforced here the plaintiffs must sue it over and recover a judgment in our courts. The remedy in the courts of equity in this state to enforce a judgment against equitable property or interests, can only be resorted to after the remedy at law upon the judgment is duly exhausted by the return of an execution thereon unsatisfied. (2 *John. Ch. Rep.* 144. *Wiggins v. Armstrong*, *Id.* 283. 4 *id.* 671. 3 *Barb. Ch. Rep.* 46.) The doctrine of these cases has been reaffirmed since the code, in *Greenwood et al. v. Broadhead et al.* (8 *Barb.* 593,) and in *Crippen v. Hudson*, (3 *Kern.* 161.) Before the return of an execution, suits in equity have been and may be instituted to remove fraudulent incumbrances which obstruct the collection of judgments at law. But in no case, that I am aware of, have suits in equity been maintained to reach equitable assets, or obtain payment of judgments, until the remedy at law had been duly exhausted. It is true, in this case, that a judgment recovered in this state upon the plaintiffs' demands will not be a lien upon the premises described in this complaint, according to the decision in the case of *Garfield v. Hatmaker*, (*supra*,) but it is nevertheless essential to establish that the plaintiffs are creditors, under the statute, of the defendant Albion M. Bostwick; and

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the return of an execution unsatisfied is essential to establish the fact that the plaintiffs have exhausted their remedy at law and that the defendant has not real or personal property sufficient to satisfy such judgment, subject to levy and sale upon execution. I think the decision at special term was correct, and that the judgment should be affirmed.

Judgment affirmed.

[MONROE GENERAL TERM, March 5, 1860, Welles, Johnson and Smith, Justices.]

LEWIS and others vs. McMILLEN and others.

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At law, a vendor cannot recover the purchase money agreed to be paid by the purchaser, nor the amount of a note given as collateral security for the payment of an installment thereof, unless he is able to give a good title to all the lands described in the agreement.

The fact that the purchaser still remains in possession of the premises, and has not surrendered the same to the vendor, will not prevent his setting up, as a defense to an action on a note given for the purchase money, the inability of the vendor to give a good title to a portion of the premises.

THIS action was brought to recover the amount of a promissory note for \$1000, made by the defendant McMillen as principal and the other defendants as his sureties, and was tried at the Ontario circuit in April, 1859. It was proved on the trial that the plaintiffs, who were assignees of one Cuyler Trask, on the 21st April, 1857, entered into a contract with McMillen to sell to him a farm in the town of Victor, containing about 96 acres of land, at \$34.50 per acre. By the contract McMillen agreed to pay \$1500 of the purchase money as follows: \$300 on the 15th May, 1857; \$200 on the 1st day of November, 1857, and \$1000 on the 1st day of May, 1858. A deed was then to be executed and a bond and mortgage given by McMillen for the residue of the purchase money. The note in

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suit was given as a further collateral security for the payment of the \$1000 installment, payable the 1st day of May, 1858. McMillen entered into possession of the farm at or about the date of the contract, and paid the first two installments of \$300 and \$200 promptly. Before the 1st of May, 1858, McMillen had discovered that as to 18 acres of the farm the plaintiff had no title. And on that day McMillen tendered to the plaintiff the amount of the installment then due, and required the plaintiffs to give him a conveyance which should vest in him the title to the whole land purchased. This the plaintiffs declined to do, on the ground that they were unable to give a perfect title. McMillen, who offered to give the bond and mortgage specified in the contract, after the refusal of the plaintiffs to give the deed, further offered to surrender the possession of the premises, and required the plaintiffs to refund what he had paid. This the plaintiffs declined. At this interview it was agreed between the parties, that they would postpone the time for performance of the contract to the 5th day of May, and would meet on that day at Canandaigua. On the 5th May the parties again met, at Canandaigua, and the plaintiffs offered to execute a deed of the farm, but did not claim, then, that they had any title to 18 acres of the land. It was proved on the trial, that the farm was occupied by one Norman Brace, who claimed the same as owner, prior to 1808, in which year he died intestate, without issue, leaving a widow. The land then passed by inheritance to Joseph Brace, the father of Norman. Joseph Brace, in 1809, conveyed the undivided half of the land to Joanna Brace, the widow of Norman; and in 1813 died intestate, leaving several children his heirs at law. There was a parol partition between the heirs of Joseph Brace and Joanna Brace, by which one half the farm, including the 18 acres, was set off to the heirs of Joseph Brace in severalty. Joseph Brace being indebted at the time of his death and his personal estate being insufficient to pay his debts, the half of the farm so set apart to the heirs of Joseph Brace was ordered by the surrogate of Ontario

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county, to be sold by his administrators. The administrator sold under his order, all except the 18 acres above mentioned, and realized sufficient from the sale to pay the debts, leaving the 18 acres the property of Brace's heirs. Joanna Brace, after the partition, married one Isaac Marsh, and with her husband continued to occupy the half of the farm set off to her, until her death. The 18 acres above referred to was not cultivated. It was wood land. Mrs. Marsh occupied some part of it during her life, but uniformly disclaimed any title or ownership to it. The judge at the circuit decided that the defendants had failed in their defense; that before McMillen could set up the breach claimed, by reason of the defect in the plaintiffs' title, he must surrender the possession of the premises to the plaintiff; that so long as he continued in possession he must be deemed to have elected to continue the contract in force, and directed the jury to find for the plaintiff, and they found accordingly.

The defendants' counsel excepted to the ruling and decision of the judge. The exceptions were ordered to be heard in the first instance at the general term.

S. Mathews, for the appellants.

James C. Smith, for the plaintiffs.

By the Court, E. DARWIN SMITH, J. The promissory note upon which this action is brought being collateral to the installment of the same amount upon the contract between the plaintiffs and the defendant McMillen, an action thereupon clearly cannot be maintained, unless the plaintiff could maintain an action on the contract, for the principal debt. By the terms of the contract, the defendant McMillen was to pay the \$1000, the amount of the note, to the plaintiffs, on the 1st of May thereafter, (May 1st, 1858,) and on such payment the plaintiffs were to convey, by a good and sufficient deed, the premises therein described; and McMillen was also, at the

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same time, to execute a bond and mortgage for the balance of the purchase money. These acts were to be performed simultaneously. In such cases neither party can maintain an action without showing performance, or an offer to perform, on his part. (*Tompkins v. Elliott*, 5 Wend. 498. *Judson v. Wass*, 11 John. 525. 20 *id.* 15.)

If this action were upon the contract, the plaintiff would be bound to aver the delivery, or a tender, of a deed sufficient and effectual to pass a good title to all the premises described. (*Fletcher v. Button*, 4 Comst. 396.) But the action being upon the note, the plaintiff was not bound to count upon the contract, or refer to it in his complaint. While this does not affect the substantial rights of the parties, it casts upon the defendants the burden of showing the plaintiffs' default, by way of defense. This the defendants attempted to do, at the trial, by showing that they were ready on the 1st of May to pay the \$1000, and offered to perform, but the plaintiffs did not perform in fact, and were not ready or able to perform on their part, but in fact had not and could not give a good title to all the premises described in the contract. The disposition of the cause at the circuit assumes that the defense was so far established. The case was withdrawn from the jury and a verdict ordered for the plaintiff, on the express ground that the defendant could not set up the breach of the contract by the plaintiff, by reason of the defect in their title, until McMillen had first surrendered the possession of the premises; and that so long as he remained in possession he must be deemed as having elected to continue the contract in force. This, it seems to me, was a mistaken view of the rights of the parties as they appeared at the trial. The ruling at the circuit would have been entirely correct if the defendant McMillen had been plaintiff and the action had been brought to recover the consideration money paid on the contract. In such case a party seeking to rescind a contract must restore all he has received under it and place the opposite party in

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his original position. (14 *Barb.* 294. 2 *id.* 82. 2 *Hill*, 288. 1 *Denio*, 73.)

But this is not the case of the rescission of a contract. The defendants did not seek to rescind the contract. They simply resisted, by way of defense, the claim of the plaintiffs to compel performance on the part of McMillen, while the plaintiffs themselves were in default, and were not able to perform.

Certainly, if the plaintiffs cannot give a good title to this farm, they should not recover the amount of the note. It may be that in equity the plaintiffs may compel a specific performance of this contract, as was done in the case of *More v. Smedburgh*, (8 *Paige*, 600.) But at law they cannot recover on it or on the note in this suit given as collateral thereto, unless they can give a good title to all the lands therein described. I cannot conceive how the possession by McMillen of the farm has any thing to do with the question whether the plaintiffs can maintain an action at law on the contract of McMillen or the note of the defendants. I think there should be a new trial, with costs to abide the event.

[MONROE GENERAL TERM, March 5, 1860. *Wells, Johnson and Smith, Justices.*]

CHAPMAN vs. THE NEW YORK CENTRAL RAIL ROAD
COMPANY.

R. was a day laborer, employed continuously upon the track of the defendants' rail road, at a fixed rate of wages per day, with an understanding that the defendants were to be at liberty, after the expiration of R.'s regular hours for labor, to require his services in case of any accident, or the occurrence of any thing endangering the running of the road, when he was to be allowed for extra time, and paid accordingly; and that if, at any time after he had performed his day's labor, he saw any thing amiss, he should, without being specially required to do so, give all necessary attention to it. Held that the negligence of R. in taking down, and failing to replace, a set of bars, in the fence of the defendant, opposite the plaintiff's land, in con-

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sequence of which the horses of the latter strayed upon the track of the rail road, in the night, and were killed by the locomotive, was the negligence of the defendants, for which they were liable in damages.

ACTION to recover the value of a span of horses belonging to the plaintiff, which were killed by a locomotive, on the defendants' rail road. The cause was referred to a referee, who found the following facts, viz : That the defendants, during the year 1857, were and still are a corporation, engaged in operating the rail road mentioned in the complaint. That the horses of the plaintiff, mentioned in the complaint, in the night of the last day of September, 1857, escaped from the pasture of the plaintiff, adjoining the defendants' road, in the town of Palmyra, on the track of the said road, through a bar-way in the fence of the defendants, while the bars were down, and while on the track they were struck by a locomotive of the defendants, while they were running on the road, and killed. That the bars were taken and left down by one Ryan, who was at the time, and had been for more than a year previous, in the employment of the defendants as a day laborer, continuously, at a fixed rate of wages per day, of about twelve hours, payable once a month, up to the first day of the month. It was understood between him and the defendants, that in virtue of that employment the defendants were at liberty, after the expiration of his regular hours for labor for any day, to require his services in case of any accident, or the occurrence of any thing endangering the running of the road, when he was to be allowed for extra time, and paid accordingly ; and further, that if at any time after he had performed his day's labor he saw any thing amiss, he should, without being specially required to do so, give all necessary attention to it. The value of the horses at the time they were killed was found to be \$310.

The referee found as conclusions of law, from these facts, that under this employment, thus understood, it was the duty of Ryan, as the servant of the defendants, which he thereby became for the purpose, to replace the bars, and his omission

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to do so was negligence of the defendants, for which, and the killing of the horses, in consequence of it, they were liable in this action. That the plaintiff was entitled to recover of the defendants in this action, as the damage sustained by him by reason of the premises, the sum of \$310, and interest; for which sum he ordered judgment in his favor, besides costs, and the defendant appealed.

O. H. Palmer, for the appellant.

J. Peddie, for the plaintiff.

By the Court, E. DARWIN SMITH, J. The plaintiff in this case has lost his span of horses without any negligence or fault on his part, through the negligence of the witness Ryan, a servant or laborer in the employment of the defendants. Ryan was a day laborer employed upon the track of the defendants' rail road, and in building and repairing fences under a foreman having the charge or oversight of a particular section of the road. Each foreman employed his own hands, and they were paid at a fixed rate of wages per day, monthly. The referee finds as matter of fact that it was understood between Ryan and the defendants that in virtue of his employment the defendants were at liberty, after the expiration of his regular hours for labor, to require his services in case of any accident or the occurrence of any thing endangering the running of the road, when he was to be allowed for extra time and paid accordingly; and further, that if at any time after he had performed his day's labor *he saw any thing amiss, he should without being specially required to do so, give all necessary attention to it.* Upon this finding on the facts, the conclusion of the referee in respect to the law, that "it was the duty of Ryan, as the servant of the defendants, to replace the bars in the defendants' fence," the taking and leaving down of which was the cause of the escape of the plaintiff'

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horses from his lot and of their loss, "and that his omission to do so was the negligence of the defendants, for which and the killing of the horses in consequence of it, they are liable," is clearly legitimate and proper.

As an original question I should have found some difficulty in coming to the same conclusion upon the facts, with the referee, upon the evidence. It seems to me that the duty of Ryan was rather one of imperfect obligation than a fixed, certain duty, arising from his contract of employment. But the witness swears unqualifiedly that his day's work commenced at 7 A. M., and ended at 6½ P. M.; and he further says, "*and if I saw any thing amiss, after that, I had to do it.*" It was certainly amiss for him not to put up the bars in question, which he took out and left out himself. He also said, "It was part of my business, when I saw a fence down, to put it up; and in case a bar was broken to put in another one." Upon this and the other evidence in the case we cannot say, I think, that the referee was not warranted in finding on the facts as he has done; or at least I do not think we are at liberty to reverse this judgment on the ground that the finding is entirely without, or against, evidence, even though we might have come to a different conclusion on the facts. I am not sure that this judgment is not sustainable upon the ground that the defendants employed and kept and continued this man Ryan in their employment, under the circumstances of this case; the foreman in particular, under whom he worked, being well acquainted with the fact that he was addicted to habits of intoxication. With such habits he was put and kept in a position on the defendants' road which enabled him to commit the gross act of negligence in question. As the defendants have thereby caused the loss of the plaintiff's horses, I am not clear that this judgment cannot be sustained on this express ground. At least it is quite apparent that they ought to suffer the consequences resulting from this negligence of their servants, rather than the plain-

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tiff, who is without fault ; and in this view of the equities of the parties, I can hardly think it our duty to interfere with this judgment.

The judgment should therefore be affirmed.

[MONROE GENERAL TERM, March 5, 1860. *Wells, Smith and Johnson, Justices.*]

NIAGARA DISTRICT BANK *vs.* THE FAIRMAN & WILLARD
MACHINE TOOL MANUFACTURING COMPANY.

A bill of exchange addressed to the drawees at the town or city in which they reside, may be accepted payable at some particular bank or place within the limits of such town or city.

But an acceptance, making the bill payable at a *different place* from that in which the drawee resides, is a material departure from the tenor of the bill ; and a presentment of the bill for payment at the place where it is by the acceptance made payable, will not be sufficient to charge the drawers.

THIS was an appeal from a judgment ordered at a special term, after a trial at the circuit by the court, without a jury. The action was brought against the defendant, which is a manufacturing corporation, incorporated under the general manufacturing law of this state, as the drawer of a bill of exchange, drawn upon the firm of A. Yerrington & Co. The defendant had its place of business in the city of Rochester. A. Yerrington & Co. resided at Cobourg, in Upper Canada. The draft was drawn by J. W. Bissell, describing himself as treasurer of the defendant, payable to the order of himself, upon A. Yerrington & Co., and addressed to them at Cobourg. The draft was accepted by Yerrington & Co., payable at the bank of Upper Canada, Port Hope. The draft was presented for payment at the Bank of Upper Canada, in Port Hope. No notice of non-payment was given to the defendant, but a notice was addressed by the notary, by mail, to "J. W. Bissell, Esq., Rochester, N. Y." There was no evi-

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dence, on the trial, of any other presentment or notice of non-payment to charge the defendant; nor was there any evidence to show that the notice addressed to Bissell ever came to the knowledge of the defendant. The judge before whom the cause was tried having rendered a judgment for the plaintiff, the defendant excepted and appealed to the general term.

S. Mathews, for the appellant.

G. F. Danforth, for the plaintiff.

By the Court, E. DARWIN SMITH, J. The acceptance of the draft in this case by the drawees, by writing their copartnership name upon it, was a proper acceptance according to the terms of the bill. Upon this acceptance the holders would have been bound to present the bill for payment to the acceptors, at their place of residence at Cobourg. But this acceptance is of no avail to the plaintiff, for it is not pretended that it was at all acted upon by presentment at that place, or protested for non-payment upon personal demand of the acceptors at their place of residence.

The rights of the parties, therefore, depend entirely upon the question whether the acceptance of the bill, also indorsed thereon by the drawees in the words following, "*Accepted and payable at the Bank of Upper Canada, Port Hope,*" is a valid acceptance, so as to dispense with a personal demand of the drawees at their place of residence. There is no proof in the case showing the relative distance of Port Hope from Cobourg, the place of residence of the acceptors, and though the court may not be bound to take judicial notice of the political divisions of foreign countries, we must know that *Port Hope* and *Cobourg* are two distinct places, and must necessarily consider that the place where this bill was made payable by this special acceptance thereof, was not the place of residence of the acceptors.

If the Bank of Upper Canada, where this bill was made

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payable by the acceptors, was located in the same city, or town, or village where such acceptors resided, according to the case of the *Troy City Bank v. Lauman*, (19 N. Y. Rep. 477,) the acceptance payable at such a bank would have been entirely proper. Such acceptance is not a departure from the tenor of the bill. It merely fixes a place of payment for the mutual convenience of the acceptors and the holder, and can work no possible injury to the drawer or indorsers as it will not affect the time for the presentment of the bill to, or for the service of notice of non-payment on the parties entitled to such notice.

But an acceptance of a bill at a different place from that of the residence of the drawee, by necessary implication from this case of the *Troy City Bank v. Lauman*, must be a material departure from the bill. This must be so upon principle. The acceptance becomes a part of the bill, and any material variance from the tenor and import of the bill, made in the terms or manner of the acceptance, taken or assented to by the holder, must be at his own risk and must discharge the drawer, if due presentment is not afterwards made at the proper place and due notice given of the non-payment of the bill. This was the principle asserted in the case of *Woodworth v. The Bank of America*, (19 John. 391,) where a promissory note was made, dated at Albany and indorsed in blank. After the indorsement of the note a memorandum was written on the margin, "payable at the Bank of America." This was held to be a material alteration of the bill, because it made it payable at a different place from the residence of the maker, and dispensed with a personal demand upon him for payment and extended the time for the receipt of a notice of the dishonor of the note. This case is within the principle of that case. Port Hope, where the Bank of Upper Canada is located, is, I understand, distant about ten miles from Cobourg; but so far as the proof shows in this case it may be 150 miles or more. In such a case the materiality of the alteration of the bill in the mode of its acceptance would be quite apparent. It might

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make a difference of several days in the time of the receipt by the drawer of the notice of non-payment. If the place of payment, in such a case, may be fixed ten miles distant from the place of residence of the acceptor, it may be 100 or 150 miles with equal reason. I think there can be no safe rule, except to confine the power of designation, by the acceptor, of the place of payment, to some place within the limits of his own city, town or village.

This question is very elaborately discussed in the answers of the twelve judges of England to an inquiry of the house of lords in the case of *Rowe v. Young*, reported in 6 *Eng. Com. Law Rep.* 63, (*S. C.* 2 *Brod. & Bing.* 165.) In that case all the judges, in opinions given *seriatim*, substantially agreed in opinion that "a qualified acceptance, making the bill payable at another town, taken by the holder without the assent of the drawer, would discharge the drawer." (*See opinion of Best J.*, p. 66;) and that such acceptance would be a *material* departure from the bill, if it affected the question of *time* in making demand and giving notice to the drawer and indorsers. The same principle is asserted in the case of *Walker v. The Bank of the State of New York*, (13 *Barb.* 636.)

It is the right of the drawer or indorser of negotiable paper to have it presented to the acceptor or maker for payment at his place of residence, unless it is, on the face of the paper, originally, made payable at some specific place, with the single exception made and allowed in the case of *The Troy City Bank v. Lauman*, *supra*; *Spies v. Gilmore*, (1 *Comst.* 321;) *Anderson v. Drake*, (14 *John.* 114;) *Taylor v. Snyder*, (3 *Denio*, 145.)

The bill of exchange in this case was not properly presented for payment at the Bank of Upper Canada, Port Hope, so as duly to protest it for non-payment, as against the drawers, but it should have been presented personally to the acceptor, at Cobourg. It not having been so presented and notice of non-payment duly given, the drawers were not properly charged by the notice given, and are not liable on the bill.

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This view of the plaintiffs' rights as shown at the trial being conclusive of the case, it is unnecessary to examine the other questions presented. The judgment should be reversed and a new trial granted.

New trial granted, with costs to abide the event.

[CAYUGA GENERAL TERM, JUNE 4, 1860. *Smith, Johnson and Knox, Justices.*]

TINKHAM vs. BORST.

The creditors of a dissolved insolvent corporation have an equitable lien upon its assets, in the hands of another, for the payment of their debts.

And it matters not whether the person holding the assets sought to be charged came by them fairly, or by force or fraud; unless he has acquired a higher or better equity to such assets than the creditor.

When a fund exists in this state, which our own citizens are entitled to have applied to the payment of their debts, the courts will detain and appropriate the fund, although the persons holding it may be accountable to a foreign jurisdiction, in reference to it.

The court will not, in such a case, disregard the rights of other parties, but it will ascertain them, and apply that portion which, after such investigation, is found to belong to our own citizens.

THE questions in this case were presented by demurrers to the second and third causes of action set forth in the complaint. These demurrers were sustained. There having been issues of fact on the first cause of action, and judgment by default against the plaintiff on that cause of action, after the demurrers to the second and third causes of action were sustained, final judgment was rendered in favor of the defendant for costs. The plaintiff appealed from the final judgment. The facts, as alleged in the second count or cause of action, and admitted by the demurrer, are as follows: On the 27th day of February, 1850, a general banking law was enacted by the legislature of New Jersey. By this law the treasurer of state was authorized to issue circulating notes to any associa-

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tion organized under the law, on the deposit with him of certain state stocks, which notes the association was then authorized to put in circulation as money, on the conditions named in the act. Any number of persons not less than seven might associate under said act, by making and signing a certificate under their hands and seals, specifying the name of the association, its place of business, the amount of capital stock, the number of shares, the names and residence of the stockholders and the amount subscribed by each of them, and the term of duration of the association; which certificate should be proved and acknowledged, and recorded in the office of the secretary of state and of the clerk of the county; and on the making and recording thereof, the said associates should become a body politic and corporate, clothed with the banking powers conferred by the act. On the 24th day of November, 1851, the defendant associated himself with six other persons under said act, and they filed their certificates of organization, duly signed, sealed and acknowledged, in the clerk's office of the county of Cape May, on the 5th of December, 1851; wherein they designated the bank as the "American Exchange Bank," and "Cape May Court House, in the county of Cape May and state of New Jersey," as its place of business; the amount of the capital stock was \$50,000, divided into 2000 shares of \$25 each, and the duration of said association from the 1st day of December, 1851, to the 1st day of December, 1871; said certificate was duly signed, sealed and acknowledged, by Tappan Townsend, Francis Brant, Ferdinand F. Cary, Edmund Cooke, John C. Morgan, Jonathan Hand and the defendant; and thereby the defendant subscribed to the capital stock \$49,750, and the remainder of said associates one share each, except Tappan Townsend, who subscribed five shares; but all said shares were subscribed for the use of, and controlled by the defendant. After said association was organized, it issued circulating notes under the act, to the amount of \$16,000, which were put in circulation by the defendant. On the 14th of September, 1852, while the bank was

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still reputed solvent, one R. Eaton drew his bill of exchange of that date at Chicago, in the state of Illinois, on said bank, for the sum of \$5243.55, payable to his own order, at sixty days date, which bill was duly accepted by the bank, and indorsed and delivered by the payee to the plaintiff, for value. The bill at maturity was duly protested for non-payment. In the year 1853, the plaintiff recovered judgment on the bill, against the bank, in the supreme court of New Jersey, for the sum of \$5647.94, on which an execution was duly issued, and returned "*nulla bona*," and that the sheriff "found no such bank, office or officers in the county." The bank then was, and still is, insolvent, and has no property or assets out of which the judgment, or any part of it, can be made. The judgment is in full force and wholly unsatisfied. The defendant furnished and owned all the securities which were deposited as a basis for the circulation of the bank, and owned and controlled for his own use and benefit, all the stock of the bank; and with intent to fraudulently appropriate the capital and assets to his own use, and to defraud the creditors of the bank, abstracted from its vaults all its circulating notes, amounting to \$16,000, without paying the bank any consideration therefor, or making any agreement with the bank for a loan, or giving any note, or security or evidence of debt for the repayment thereof, and without the consent of said bank, and converted the same to his own use. The defendant has never since paid said sum, or any part thereof, to or for the use of the bank; and the abstraction of said circulating notes deprived the bank of all its assets and means of doing business, and paying the plaintiff's debt, and reduced it to insolvency. On the 22d day of May, 1853, the bank was restrained by an order of injunction of the court of chancery of the state of New Jersey, from the exercise of its franchises as a corporation; in pursuance of an order of said court of the 23d of June, 1853; the treasurer of that state applied all the stocks deposited with him by the bank, to the redemption of its circulating notes; the bank became and was duly declared

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insolvent; the corporation has been dissolved by the decree of said court of chancery, and has now no legal existence; the liability of the defendant to the bank, for the abstraction of its assets, has never been enforced, and the plaintiff claimed that he had a right to be subrogated in the place of the bank, and enforce said liability. The plaintiff is the only creditor of said bank; the defendant, when said bill was accepted, was the sole owner and virtually the sole stockholder of said bank, and all the other stockholders are insolvent. The third count or cause of action states no additional fact, except that the defendant has never paid any part of his stock subscription, and it insists that the plaintiff has the right to be subrogated in the place of the bank, and collect so much of said stock subscription as will be necessary to satisfy his claim. The grounds of demurrer are; as to the second cause of action, that it does not contain facts sufficient to constitute a cause of action; as to the third count, the same, with the additional ground, that it contains no statements of fact, but only conclusions of law.

J. L. Jernegan, for the plaintiff.

John E. Burrill, for the defendant.

By the Court, MULLIN, J. The second count or cause of action in this complaint charges in substance that the plaintiff is a creditor by judgment of the American Exchange Bank, a banking corporation, located in New Jersey and organized under the banking law of that state, which is substantially like the general banking law of this state. It is also alleged that said corporation, having become insolvent, was dissolved by the court of chancery of that state; that the defendant, being the principal stockholder in said bank, fraudulently abstracted the assets of said bank to the amount of some \$16,000, and that the plaintiff is the only creditor of said bank. The relief demanded is that the defendant pay to the plaintiff his

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said debt with the costs of the action, and such other or further relief as the court may deem proper.

There is a demurrer to this cause of action, on the ground that it does not contain facts sufficient to constitute a cause of action. The demurrer admits the facts alleged in the complaint.

The question which lies at the foundation of this action is this: Have the creditors of a dissolved insolvent corporation a lien on its assets for the payment of their debts? If they have, it would not seem to be very material in whose hands the assets were, or how they came into the hands in which they are sought to be charged; unless the holder has acquired a higher or better equity to such assets than the creditor. In other words, it does not seem to me to be material whether the person holding them came by them fairly, or by force or fraud.

Have these creditors, then, of an insolvent corporation, such an equitable lien as is claimed in this case? At common law the assets of a dissolved corporation reverted to the crown, and the debts due by it were canceled. (2 *Kent's Com.* 307. *Angell & Ames on Corp.* 667.)

A rule so repugnant to every principle of right and justice should not be followed, unless it is imperatively required by the binding force of express adjudication. While the existence of the old rule is admitted, that it is now the law in this state, aside from the statute, may, I think, be safely denied. The provision now in force, (2 *R. S.* 5th ed., 597, § 9,) declaring that on the dissolution of a corporation the directors or managers, unless some other persons shall be designated, shall be trustees of the creditors and stockholders, was copied from 1 *R. L.* 248, § 1. This statute does not in terms create a lien of any kind on the corporate property. But it recognizes very distinctly the right of creditors and stockholders to the assets, and constitutes the directors the trustees to take charge of them for the parties entitled.

In *Mann v. Pentz* (3 *Comst.* 415) Judge Pratt asserts, in the most distinct terms, the existence of the equity, and relies,

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in support of the proposition, not on the statute but upon cases in Massachusetts and in chancery in this state.

I entertain no doubt but that creditors of dissolved insolvent corporations have a lien on the assets, for the payment of their debts.

It is insisted that if there is any right to charge the defendant with the debts of this corporation, the creditor cannot do it in his own name, but the receiver whom the law will presume to have been appointed by the court of chancery of New Jersey, on dissolving the corporation, or the state itself should be the party plaintiffs.

The defendant and the fund sought to be charged are both in this state; the plaintiff is seeking the aid of our courts to enforce a plain equity under circumstances which entitle him to relief if it can be consistently rendered. It is not alleged that the equity claimed is not recognized in New Jersey, and as that state has a court of chancery we must presume that it recognizes the existence of this equity. But we cannot presume that that court has appointed a receiver of the effects of the dissolved corporation; but if it had, it is by no means clear that he could maintain an action as such in this state. Nor has it been suggested how the state could sue, unless it was upon the ground that it owned the assets by reverter.

Where a fund exists in this state which our own citizens are entitled to have applied to the payment of their debts, the courts will detain and appropriate the fund, although the persons holding it may be accountable to a foreign jurisdiction in reference to it. The court will not, in such case, disregard the rights of other parties, but it will ascertain them and apply that portion which after such investigation is found to belong to our own citizens.

It was said, on the argument, that there is no privity between the plaintiff and the bank, to which the right of action for the fraudulent conversion of the assets of the bank belonged, and because the plaintiff cannot maintain this suit. This action

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is not sustainable on any such theory. It rests on the equity already referred to, and not on privity, or upon any assignment legal or equitable.

I am of the opinion that the second cause of action does contain facts sufficient to maintain the action, and that the demurrer to it could not be sustained. But the third cause of action is defective.

The order appealed from must be affirmed as to the third cause of action and reversed as to the second; with leave to the plaintiff to amend his complaint and to the defendant to answer; costs of the appeal to abide the event.

NEW YORK GENERAL TERM, May 7, 1860. *Sutherland, Mullin and Leonard*, Justices.]

DODGE vs. DODGE and others.

When it clearly appears, from a will, that the testator has distributed the residue of his property, after making provision for his widow, amongst his children or other persons, in such proportions as he considered them entitled to; and that, to allow the widow to take both the provision of the will and her dower out of the estate would defeat, or materially lessen, the allotments to all or any of the devisees or legatees, the intention of the testator, not to give her both the provision and dower out of his estate, is plainly manifested, and the court should require the widow to elect.

A testator, by his will, devised to his wife, during her life, the use of the homestead at T. except such part as he bequeathed to his son. He then gave to her an annuity of \$400 during life, charged upon certain lots situate in the city of New York, which lots were divided among his children. It was provided that those lots should be holden to pay their respective shares of the annuity, in proportion to their assessed valuation in the public inventory of property. It was further provided that the testator's son J. should never possess the right to sell the house and lot devised to him, but that the same should be held by a trustee to be appointed by the court, and the trust should cease at the death of J.; and that J. should not receive any income from the rents or profits of the premises, unless he should become the head of a family; in which case the entire annual income should accrue to him; or if J. should remain single, at the age of 40 years and upwards, and become infirm or unable to support himself, the trustee was directed to grant

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him an annuity of \$100 for his support. It was further provided that as there were certain incumbrances upon the New York lots, the proceeds and profits of the estate, after the necessary current expenses were paid therefrom, should be appropriated to pay the annuity.

Held that the provisions of the will, in behalf of the testator's children, demonstrated that it was not his intention to give the widow both dower and the annuity; and that she was bound to elect between the annuity and her dower.

A PPEAL from a judgment entered at a special term. The plaintiff, Abigail Dodge, was married to Josiah Dodge, December 29th, 1846. On the 20th day of March, 1855, Dodge died, at Troy, in the state of New Hampshire, where he then resided, leaving him surviving Sarah E. Flagg and Josiah Dodge, children of a former marriage, and Henry Dodge, an infant, the issue of the marriage with the plaintiff. At his decease, he was seised in fee of real estate, in New York and New Hampshire, being dwelling houses and lots, numbers 89, 91, 93 and 95 West Eleventh street, in the city of New York; also, three unimproved village lots in South Fordham, Westchester county, in this state. Also, a piece of land, with the buildings thereon, known as the Homestead, situate in Troy, Cheshire county, New Hampshire. Also, two other parcels of land, situate in Troy aforesaid. Josiah Dodge made his last will and testament, by which he devised to the plaintiff a life estate in the homestead at Troy, and bequeathed to her an annuity of four hundred dollars, chargeable upon the rents of the four houses in West Eleventh street. By the terms of the will the real estate is devised as follows: To Sarah Elizabeth Flagg, houses and lots Nos. 89 and 93 West Eleventh street; also, lots 67 and 3 South Fordham, in fee. To Josiah Dodge, lot 39 South Fordham, in fee; also, house and lot number 95 West Eleventh street, in trust during his natural life, with the qualifications and conditions by said will imposed. Elbert L. Burnham was appointed trustee by the supreme court, Oct. 30, 1856. To Henry Dodge was given the house and lot number 91 West Eleventh street, New York; also three parcels of land in

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Troy, New Hampshire, including the homestead, in fee, subject to the charges in said will mentioned. The pecuniary allowance provided by the will for the widow has been at all times punctually paid to her. This action was commenced to procure an admeasurement of dower, which the plaintiff claimed, notwithstanding the provisions of the will. The action came on for trial before Justice ROOSEVELT, at a special term, in December, 1857, and judgment was given in favor of the plaintiff for the reason that although there was no probability that the testator intended that the plaintiff should have both the annuity and her dower, yet, as he had not said so, in terms, and as there was no absolute incompatibility, she was entitled to both, and was not required to elect.

E. W. Dodge, for the appellants.

Geo. F. Strong and *M. S. Bidwell*, for the plaintiff.

By the Court, MULLIN, J. The only question presented by the appeal in this case is, whether, under the provisions of the will of Josiah Dodge, deceased, the widow is compelled to elect between the provision made for her by the will, and her dower; or whether she is entitled to both the provision and the dower.

The will devises to the wife during her life the use of the homestead at Troy, in Cheshire county, New Hampshire, except such part as he bequeathed to his son. He further bequeathed to her an annuity of \$400 during life, payable semi-annually in sums of \$200 each, the first payment to be made in six months from his decease. This annuity was charged upon the testator's real estate situate in West Eleventh street in the city of New York. This real estate was disposed of as follows: Lots Nos. 89 and 93 to his daughter Mrs. Flagg; to his son Josiah, No. 95; to his son Henry, No. 91. It was further provided by said will that said lots should be holden to pay their respective shares of said annuity, in

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proportion to their assessed valuation in the public inventory of property. It was also provided that said Josiah should never possess the right to sell said premises, but that they should be held by a competent trustee, to be appointed by the probate court, which said trust should cease at the death of said Josiah, and that said Josiah should not receive any income from the rents or profits of said premises unless he should become the head of a family, in which case the entire annual income should accrue to him; or if Josiah should remain single, at the age of forty years and upwards, and become infirm or unable to support himself, the trustee was directed to grant him an annuity of \$100 for his support. It was further provided by said will that as there were certain incumbrances upon the Eleventh-street property, the proceeds and profits of said estate, after the necessary current expenses were paid therefrom, should be appropriated as far as necessary, and were made liable to pay said annuity.

These are all the provisions of the will in relation to the Eleventh street property.

It seems that the testator died possessed of a considerable amount of personal property, and seised of other real estate in New York and New Hampshire. He gave portions of the real estate out of the city of New York to each of his children, and to some of them shares of his personal estate.

Whether the division of his estate amongst his children was an equal one, neither the pleadings nor the evidence enable us to determine. It is enough for us to know that he was competent to understand the claims of the several members of his family upon his bounty, and he is to be presumed to have made such a division of his property as was right and just in view of the situation and claims of his wife and children.

The right of the widow to dower in the lands of her husband is superior to all other liens and claims upon it not created by her act, or existing at the time of the marriage. The husband cannot, by any act of his, deprive her of this right.

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If he makes provision for her by his will, and does not declare that it shall be in lieu of dower, she is, as a general rule, entitled to both the provision and dower.⁸ (*Fuller v. Yates*, 8 *Paige*, 325.)

Whether she is entitled to both, or is put to her election between the provision in the will and dower, is a question of intention on the part of the testator.

The intention to give both is presumed, unless the other provisions of the will are such as to manifest an intention to put her to her election. (*Lewis v. Smith*, 5 *Seld.* 502.) It has been held not to be enough that other provisions of the will will be interfered with, but it must clearly appear that the testator would not have distributed his property in the manner in which it is distributed by the will, had he contemplated that the widow could have claimed or been entitled to her dower in addition to the provision in the will.

When a testator makes a provision in his will for his widow, without declaring it to be in lieu of dower, and devises the residue of his property amongst other persons, it would seem to be an indication that he intended the division thus made should not be disturbed by his wife's claiming dower out of the property thus distributed. But such a devise of the residue of the estate, after making provision for the wife, has not been held such conclusive evidence of an intention to put the widow to her election as to induce the courts to compel her to elect. Some more decisive evidence of intention has been required.

It seems to me that when it clearly appears by the will that the testator has distributed the residue of his property, after making provision for his widow, amongst his children or other persons in such proportions as he considers them entitled to, and that to allow the widow to take both the provision of the will and her dower out of the estate, would defeat or materially lessen the allotments to all or any of the devisees or legatees, that the intention of the testator not to give her both the provision and dower out of his estate is

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plainly manifested, and the court should require the widow to elect.

The rule that has heretofore prevailed, has in very many cases operated oppressively and unjustly on heirs and legatees, and most frequently in cases when either the dower or the provision of the will was amply sufficient for the wife, while giving her both was ruinous to others entitled under the will.

In this case, it seems to me that the provisions of the will in behalf of the children demonstrate that it was not the intention of the testator to give the widow both dower and the provision. If she is entitled to the annuity she takes it without diminution; if she takes dower she is entitled to one third part of each house and lot on which that annuity is charged. The remaining two thirds then must have charged upon them the whole of the share of each lot in payment of the annuity. If one third of the annuity was extinguished with the assignment of the dower in the Eleventh street property, there would be less ground of complaint. But no such result is attainable. The whole annuity must be paid, and two thirds of the property charged with it must pay it.

Again: lot 95 West Eleventh street is by the will given to a trustee, in trust to receive the rents and profits to be paid over, under certain restrictions and limitations, to Josiah during his life. It was intended as a provision for the support of himself and family, if he should have one, and if the widow takes dower, one third of the means of support thus provided is taken away. Was such the intention of the testator? It seems to me not.

The trust created or intended to be created by the will, for the benefit of Josiah, would be entirely inconsistent with the right of the widow to dower. But it is said that the trust is invalid and is therefore to be considered as if no such provision was contained in the will. I do not agree to the conclusion. The controlling consideration in the construction of the will is the intention of the testator. And if the creation of the trust manifests an intention inconsistent with the right

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of the wife to the provision and dower, it cannot change the intention if the trust is subsequently declared illegal and void. The testator deemed it valid when he made it. It was one of the means which he adopted to give effect to his intention, and whether legal or illegal, the intention manifested by the provision should have effect.

Without occupying more time in discussing the question, I must declare my conclusion to be, that under the provisions of this will the widow must be put to her election between the provision of the will and her dower. She cannot have both.

Judgment accordingly.

[NEW YORK GENERAL TERM, May 7, 1860. *Sutherland, Mullin and Leonard*, Justices.]

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SPOONER vs. THE BROOKLYN CITY RAIL ROAD COMPANY.

No action will lie against another to recover damages for a personal injury, where it appears that the carelessness and imprudence of the plaintiff contributed to the injury.

Thus, where the plaintiff, with knowledge that an omnibus sleigh, belonging to the defendant, was full of passengers, stopped the same, and voluntarily and deliberately placed himself upon the fender, on the outside of the sleigh—a place not made or intended for passengers, but designed as a defense to the sleigh—although warned by a fellow passenger of the danger of the position, where he was injured by a collision with another vehicle: *Held* that whatever might have been the misconduct of the defendant in other respects, the plaintiff was guilty of gross imprudence and misconduct himself, which either caused or contributed to the injury; and that he could not recover damages for such injury.

THIS was an appeal from a judgment of the city court of Brooklyn in favor of the plaintiff, for \$5453.62, and from an order of that court denying a new trial, applied for, on the ground that the verdict was against evidence, and the damages excessive. The action was brought to recover damages for an injury sustained by the plaintiff while a passenger upon

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one of the omnibus sleighs of the defendants, in the city of Brooklyn, in consequence of a collision with another sleigh.

John Greenwood, for the plaintiff.

G. T. Jenks, for the defendant.

By the Court, BROWN, J. The case of *Caldwell v. Murphy*, (1 Duer, 233,) and that of *Carroll v. The New York and New Haven Rail Road Co.*, (*Id.* 571,) so much relied upon by the plaintiff on the argument of this appeal, are not authorities in his favor. In regard to the agency of the plaintiff in bringing about the event which is the subject of the action, there is little, if any, resemblance. In the first case the plaintiff was a passenger, riding upon the top of the defendant's stage, from which he was thrown and injured in consequence of the stage being carelessly driven against a large stone and overturned. It appeared from the evidence that there were seats upon the top of the stage, where passengers habitually rode, and that the presence of the plaintiff at the place from which he was thrown did not cause or contribute to the accident in any way. The court very properly held that the plaintiff was guiltless of the negligence which caused the injury. In the case of *Carroll v. New York and New Haven Rail Road Co.* the plaintiff's injury resulted from the collision of two trains of the defendant's cars running in opposite directions. The defendants relied, as a defense, upon the plaintiff being, at the time of the accident, in the post office apartment of the baggage car, a place much more dangerous, in the event of a collision, than the passenger cars, and forbidden to the passengers by a printed notice to that effect, posted up in the car. The court held that the existence of this fact did not bring the plaintiff within the rule "that whenever it appears that the plaintiff's negligence or wrongful act had a material effect in producing the injury, or contributed towards it, he was not entitled to recover. No care on his part could

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have prevented the collision. No vigilance on his part after there were any grounds for apprehending a collision, could have saved him from injury. The collision, therefore, was wholly without any fault or negligence on his part, and by the collision he was injured. It was the duty of the defendants to employ the most scrupulous care and attention to prevent a collision of their trains running in opposite directions. The plaintiff was under no obligation to the defendants to select a location with a view to avoid the possible consequences of a neglect of that duty. A neglect of that duty would be generally regarded as imminently perilous to all the passengers on board. The defendants, at the time of the collision, were not in the lawful exercise of their rights." In the present case the defendants were in the lawful exercise of their rights, and if guilty of the negligence or inattention which brought their stage sleigh in contact with the coal sleigh referred to in the evidence, it was not the collision, exclusively, which caused the injury to the plaintiff, but the collision combined with the perilous position in which he had chosen to place himself. I entertain no doubt—no one who reads the evidence can entertain a doubt—that if the plaintiff had been inside of the body of the defendants' sleigh, in the place usually occupied by the passengers, he would have remained wholly unharmed, notwithstanding the collision.

The stage sleigh of the defendants, upon which the plaintiff was riding at the time of the accident, was drawn by six horses and attended by a driver and a conductor. It was from 20 to 25 feet long, and capable of seating from 28 to 30 passengers. There was no difference of opinion among the witnesses, as to the completeness and perfection of its construction. John Stephenson, a sleigh and omnibus maker since 1827, testified that it was of good materials and workmanship; "of the most approved mode of construction. It was of the best construction at the time it was built, and there has been no improvement since." No witness gave it any other character or description. It did not break down or give way in any par-

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ticular, and no one pretended upon the trial that the accident was in any way attributable to the imperfect and insufficient construction of the vehicle upon which the plaintiff was riding. Indeed he does not charge any thing of the kind in his complaint. He only alleges, in respect to the sleigh, that it was crowded with passengers, and that he was compelled to ride on the outside thereof. In the preparation and construction of the means of conveyance, the defendants had done all that well directed skill could do, and they had fulfilled the conditions which the court of appeals announced as the rule in *Hegeman v. Western Rail Road Corporation*, (3 Kern. 9.)

In the third cause of action assigned in the complaint it is alleged that the collision with the coal sleigh was the result of the defendants' carelessness and negligence. This allegation, however, is not sustained by the evidence. There is no material variance in the testimony on this part of the case. The collision occurred on the 10th January, 1856, when the streets of the city were heavily burdened with snow. It was piled up on both sides of the street, where it had accumulated by that thrown from the sidewalks. The stage sleigh was on its way down Fulton street, having the right hand and east side of the track, while the coal sleigh was going in the opposite direction, having the westerly or southwesterly side of the street. The witnesses concur, generally, in saying that the stage sleigh was proceeding on its journey moderately and slowly, and that the coal sleigh was coming at a rapid pace. The occurrence is thus described by Leonard Beasley, the driver of the defendants' sleigh: "I saw the coal sleigh coming, and hauled my sleigh to the right, not very short. I took a steady course, so as to prevent my sleigh from slipping sideways. The other sleigh came on and kept slipping a little. When he got against us he gave his horse a short turn up the bank, towards the Clinton street side. His horse was coming on a good gait; he was jumping as though he was struck by something, or afraid. When he turned up Clinton street it threw the hind part of his sleigh right into mine and struck

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my sleigh about the center, as near as I could judge. When I first saw the sleigh coming I was about the center of the street, and I turned out slowly so as to prevent my sleigh from slewing around." The plaintiff was himself examined as a witness in his own behalf, and furnished substantially the same account of the occurrence. He says: "I saw a horse coming up from the ferry; whether he was running away or not, I cannot say. He was going as fast as he could. The omnibus sleigh was going slow across the street. I drew in my feet and the coal sleigh slipped down upon the other sleigh. The stage horses were walking very slow, and the other horse was at the top of his speed. It was a coal sleigh, with an empty box. The omnibus sleigh was turning to the right, and the coal sleigh slid down against it. The stage sleigh occupied the middle of the road. It was about five or seven feet from the front of the sleigh to the curb. The hind part of the sleigh could not have been more than five or six feet from the curb." Again he says: "The stage sleigh did not lurch or slew towards the coal sleigh." S. M. Moore, a witness for the defendant, testified: "I was standing with the driver, in his seat. I saw the coal sleigh only a few minutes before the accident occurred. When the accident occurred, the hind part of the coal sleigh swung round. The horse of the coal sleigh turned in towards the walk as we were passing. The hind part struck in very short as if it slipped down the bank. The stage sleigh was turned in a little towards the right and the horses were going slow." Edward H. Puffer, another passenger on the stage sleigh, was examined as a witness, and said: "I did not see the sleigh until it was close to us. We were not going very fast. The head of the stage sleigh was a foot or a foot and a half turned out of the middle of the street to the right. The coal sleigh was coming at a pretty good rate, and as it got abreast of us it swung around and struck our sleigh just where Mr. Spooner was standing." There was other evidence to the same effect. I am thus particular in referring to the evidence, because it shows what has not been

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seriously controverted, that the collision was not produced by any negligence or misconduct of the defendants' driver; that he was proceeding at a moderate and reasonable rate of speed along the street; that the stage sleigh was not driven against the coal sleigh, but that the latter by being suddenly turned towards the sidewalk the hinder end either slipped down, as the plaintiff says, or was slewed down, as the other witnesses say, upon the stage sleigh, and thus caused the collision which injured the plaintiff. If then the accident was not the result of any negligent or careless construction of the vehicle upon which the plaintiff was riding, and if the collision with the coal sleigh by which he was injured resulted from the slipping of the coal sleigh down upon the stage sleigh, or from the slewing of the hinder end of the former upon the latter, the collision is in nowise attributable to the negligence of the defendants or their servants, and we must look for some other ground upon which the action can be maintained. This brings us to consider the real question in controversy in the action. In assigning the first cause of action, in his complaint, the plaintiff says "that the said stage sleigh was negligently, carelessly and improperly provided by the said company with a certain ledge or foot board running along the sides thereof, for passengers to ride thereon, and upon which passengers were negligently and carelessly allowed to ride, or induced to ride, by the said company, their agents and servants. And this plaintiff alleges that by such negligence and carelessness he was, on the day aforesaid, induced and allowed to ride and stand on the said stage sleigh as a passenger, and on the said ledge or foot board thereof, and was not so safely conveyed, but on the contrary, while on said passage and while so standing on said foot board, the said foot board was struck and broken in pieces by the contact or collision of another sleigh coming from an opposite direction, by which collision and breaking this plaintiff was thrown from said foot board and sleigh, breaking his arm and leg," &c. The ledge here spoken of is sometimes called a ledge by the witnesses, sometimes a

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foot board, and at other times a fender. It was in fact a combination of both foot board and fender. It is thus described by the witness John Stephenson, the sleigh and omnibus maker : "The fenders are continued to the rear. The arrangement of the fenders was made in such a manner that the conductor could pass all around the sleigh and collect the fare from inside passengers. The first sleigh had no hand rail and the fender less projecting, and we found in use that people would jump on and fall off, from not being able to keep hold. The hand rail was put on to avoid such accidents, and the fender was then made a broad board passing over the cross-pieces. That made it slippery, as the snow and ice would accumulate on it, and persons fell off. The reason of a double rail was to let the snow down and make a better footing. The outer rail is five inches and the inner three inches wide. This is the most approved mode of construction. Before the wide fender was adopted it was found that wheels would strike the body, and the fender was widened so as to keep other vehicles away and prevent injury to passengers." Seats were provided, inside of the sleigh, for 28 or 30 passengers, and it also appeared that when these seats were full passengers would take their places on the fenders, and the company collected the usual fare from them. From these fenders they also entered and occupied the seats inside, as they were from time to time vacated by those leaving seats. When the plaintiff got upon the sleigh there were no vacant seats. The inside was crowded to excess. One of the witnesses says it was unreasonably full. The plaintiff himself describes the condition of things; I quote from his testimony. "I came out of my house, No. 38 Bond street, a little before 9 A. M. I waited till two or three sleighs had passed. They were filled, outside and in. I was familiar with the sleighs of this line. I do not know whether it was the second or third sleigh. I got on the outside. Finding it was impossible to get a seat inside, I was obliged to get outside. This was either the second or third sleigh that had come along since I was waiting. The sleighs were crowded,

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inside and outside, and on the string boards. The sleighs that passed were so full that I could not get inside, or ride outside. I mean on what they call the fenders. The fenders were filled, on the other sleighs. When the sleigh came along on which I got on, the left side was vacant and the other side full. The inside was full to excess, and one man sat with his feet towards the center and his back towards the driver or box. It was entirely full so you could not get a little child in. Mr. Sutton got on when I did. When I got on, I held on the rail with my right hand, and my left hung down; that is the way it was broken. The driver stopped for me. I stopped him. At that time I could not have found a place inside." According to his own showing the plaintiff deliberately and voluntarily took his place upon the fender upon the outside of the sleigh. He was not crowded into that position from one which he had obtained inside and out of danger. He was not invited to go there, nor was he put there, by the agent of the company. After seeing two other sleighs pass, and with which he says he was quite familiar, he stopped the sleigh and took the position in which the collision with the coal sleigh found him. And it will be seen presently that in any other position upon the sleigh he would have remained unhurt. The company were in nowise responsible for the crowd of passengers seeking conveyance, on that morning. It resulted, necessarily, from the condition of the streets, incumbered and embarrassed with the snows of two recent storms. We were not told, upon the argument, what was the duty of the defendants' driver at the time the plaintiff stopped him and stepped upon the fender of the sleigh. He might, it is true, have disregarded his request and passed on; or he might have used persuasion or force to prevent the plaintiff from taking and occupying a place dangerous to his safety. But I submit that if this was a negligent omission on the part of the driver, it was one which the plaintiff procured and approved, and for which he is quite as responsible and culpable as the driver. It may be said, (indeed it was said upon the argument,) that the fenders were

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provided as a place to carry passengers. Evidence was given by the plaintiff to show that passengers frequently rode upon them and paid the usual fare. The defendant, on the other hand, gave evidence to show they were designed for a very different purpose. Now if the purpose and the uses of these fenders was an open, unsettled, disputed question, (which I think it was not,) the defendants had a right at least to have it submitted to and passed upon by the jury. They asked the judge, at the close of the evidence, to instruct the jury that it was for them "to determine whether the hand rail was placed upon the sleigh to invite passengers to ride upon the fenders, or to protect such as might ride thereon." He declined, and the defendants' counsel excepted. It was also said that the sleigh was improperly and negligently constructed, because the fenders were of such a kind that with the aid of the hand rail passengers were induced to stand, and did stand upon them. The gravamen of the plaintiff's complaint is that he was "induced and allowed"—these are his words—to stand on such fender as a passenger. The proof, however, affirms, and there was no evidence of an opposite kind, that the fenders are indispensable for the protection of the body of the sleigh and of the passengers riding therein. Indeed it is notorious that to a vehicle without wheels and axles, fenders are as indispensable safeguards as they are to a ship lying alongside of a wharf, beaten by the winds and tides. The theory of this argument is, that fenders outside the body of the sleigh, and any thing else upon which passengers may stand or to which they may cling, is sufficient evidence of malconstruction and negligent omission, to entitle a passenger "allowed" to stand thereon, to recover for an injury caused solely by the misconduct of a third person. I do not recognize the reason or the legal force of such a rule, for it ignores the necessity of all care and all prudence on the part of the passenger, and implies the total absence of the instinct of self-preservation inherent in all rational creatures.

The collision found the plaintiff in the same situation in

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himself. He cannot say that a sense of danger was not present to his mind, for a person who entered the sleigh at the side of the track, says he got over the rail because his legs were broken by riding outside, and not as a burlesque on riding in a sleigh, and run the risk of having one's legs broken." There was no discrepancy in the evidence, as to the manner in which the plaintiff was injured. It is thus described by Henry Tomes, one of the plaintiff's witnesses: "I saw the coal sleigh coming up, on the left hand side. The string piece of the coal sleigh was higher than the guard of the stage, and swept along and knocked Mr. Spooner off." His left arm was fractured, above the elbow, his right leg broken below the knee, and he was otherwise seriously injured. It is manifest, therefore, that the injury is attributable to the position in which the plaintiff had placed himself, and that had he occupied a place inside the sleigh he would have remained entirely unharmed." In *Haring v. The New York and Erie Rail Road Company*, (13 Barb. 9,) the plaintiff was nonsuited upon the trial because it appeared that her intestate had driven his horse and sleigh at a rapid rate across the line of a rail road, at the point where the collision occurred, without taking any care or precaution against the probability of a train of cars approaching. The court affirmed the nonsuit, and declared the rule to be well settled that where the carelessness and imprudence of the person injured contributed to the injury, an action for damages could not be sustained. In the more recent case of *Dascomb v. The Buffalo and State Line Rail Road Co.*, (27 Barb. 221,) it was also held that a plaintiff living about the fourth of a mile from a rail road track, and owning a farm divided by the track, who left his house with a horse and wagon and drove across the track without taking any precaution to see whether a locomotive was approaching, and was injured, was guilty of gross carelessness, and could not recover for the injury. It was also

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held that it was the duty of the court to have nonsuited the plaintiff. In *Mackey v. New York Central Rail Road Co.*, (*Id.* 528,) the intestate was driving his team towards the rail road crossing, and was told by a witness that the cars were coming. He turned his head towards the witness, then struck his horses with the lines and went upon the track, and was killed by the locomotive. The court decided that the plaintiff, his administratrix, could not recover, saying, "In such a case a party is bound to exercise care, diligence and foresight in proportion to the danger to be avoided and the fatal consequences involved in his neglect." I am not able to reconcile the plaintiff's claim to recover in this action with the principle of these cases, and many others to which I might refer. The fender upon which he voluntarily placed himself, and from which he was thrown, was not made as a place to seat or stand passengers. As its name imports, it was constructed as a defense, to receive and ward off the crash and pressure of adverse and outside forces. And if the plaintiff, with full notice and knowledge of the danger, chose to put himself upon this fender so as to receive the assaults of these forces upon his own person, whatever may have been the misconduct of the company, in other respects, he is guilty of gross imprudence and misconduct himself, which either caused or contributed to the injury, and cannot recover.

The defendants also requested the judge, at the close of the evidence, to instruct the jury that if they "find that the place upon the sleigh occupied by the plaintiff was known to him, before he got upon it, to be unsafe in case of accident, the plaintiff was as much bound, in the exercise of proper care, to avoid taking the position, as if notified not to do so by the company." The court declined so to direct the jury, and the defendants again excepted. This request embodied a correct legal proposition having reference to the purposes for which the fenders were erected. If they were not the places provided for the conveyance of passengers, and the plaintiff knew, or had notice from others, that the place upon them was danger-

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ous, the company were under no obligation to communicate to him formally information of which he was possessed already. What particular instruction or charge was given (if any) to the jury we do not know, for none appears upon the printed case. I attach no particular importance, however, to the omission of the judge to charge as requested; for I think the defendant's motion for a nonsuit, when the plaintiff rested, should have been granted.

There should be a new trial, with costs to abide the event.

[DUTCHESS GENERAL TERM, May 14, 1860. *Lott, Emmet and Brown*, Justices.]

THE PEOPLE, *ex rel.* The Brooklyn Industrial School and Home for Destitute Children, *vs.* THOMAS KEARNEY.

Where a child has been duly surrendered by its father and natural guardian to the Brooklyn Industrial School Association and Home for Destitute Children, pursuant to the charter of that association, by an instrument in writing signed by the father, such surrender will not be superseded, and rendered inoperative and void, by an order subsequently made by the surrogate, appointing an individual the general guardian of the infant.

JESSE C. SMITH, for the relator.

John Greenwood, for the defendant.

By the Court, BROWN, J. This is a certiorari, brought to remove and review certain proceedings upon a habeas corpus, had before Samuel D. Morris, Esq., county judge of Kings county, in which he awarded the custody of Catharine Laffin and Mary Ann Josephine Laffin, infant children of John Laffin, deceased, to the defendant, Thomas Kearney. The relator claimed the custody of the children by virtue of an instrument in writing executed by John Laffin, the father, on the

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13th December, 1858, and just before his death ;(a) and the defendant claimed the care and control of them as their guardian, duly appointed by the surrogate of the county of Kings, on the 2d March, 1859. The infants are of very tender years, the eldest, Catharine, having been born on the 26th of October, 1853, and the other, Mary Ann, on the 19th of October, 1855. The death of their father left them both orphans without property or means of support—in fact both at the time their father executed the instrument of the 13th December, 1858, and also when the defendant procured himself to be appointed their guardian, they were in a state of utter poverty and destitution, and have so remained to the present time.

At the common law, the parents are the guardians of their infant children, first the father, and if he be dead, the mother. This results from the nature of the relation between parent and child, and is a recognition of the ties, duties and obligations which bind them to each other. By the 5th section of the act in regard to the tenure of real property, where an estate in lands becomes vested in an infant, the guardianship of such infant, with the rights, powers and duties of a guardian in socage, shall belong, 1st, to the father, and if there be no father, to the mother ; and if neither father or mother, to the other relatives of the infant. This class of guardians would have authority to take charge of the whole estate, both real and personal. But when there is no real estate, the fa-

(a) The instrument was as follows : " I, John Laffin of the city of Brooklyn, father of Catharine or Kate — Mary Ann Josephine Laffin, do commit and surrender said children to the care and management of the Brooklyn Industrial School Association and Home for Destitute Children, with the powers and subject to the provisions contained in the act incorporating said Association and Home.

Dated Brooklyn, December 18, 1858,

his
JOHN † LAFFIN.
mark.

Witness, Annie Kimberly.

Witness, Susan C. Smith."

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ther, as the guardian by nature, has no power over the personal estate of his infant child. The rights and authority of this class of guardians are, in all cases, superseded when a guardian is appointed by the deed or last will of the father, or in default thereof by the surrogate. (2 *Kent's Com.* 224.) The first section of the act concerning guardians and wards gives to the father power, by deed or will duly executed, to dispose of the custody and tuition of his infant children, during their minority, or for any shorter period, to any person or persons. And section two declares that the person to whom it shall be made shall have all the rights and powers, and be subject to the duties and obligations, of the guardian of such infants; and such disposition shall be valid and effectual against every other person claiming the custody or tuition of said infant, as guardian in socage or otherwise. I am thus particular to refer to these rules of the common and statute law, for the purpose of keeping in mind that the power of the father, as the natural guardian of his infant children while living, and his power to appoint a testamentary guardian for them during their minority, after his death, has always been maintained and still remains unimpaired.

The power of the surrogate, under the act concerning guardians and wards, is not limited to that favored class of infants who are endowed with estates real or personal. He may doubtless appoint a guardian for the infant inmate of a poor house, without property, and without name or lineage. But it would be vain to deny that the statute, and the practice under it, has reference specially and particularly, nay almost exclusively, to the former class. This is manifest from the various provisions in regard to bonds with sureties for ascertaining the value of the infant's property, and for the keeping, rendering and settling accounts, and for compensation and recompense for expenses and services, and for the removal of the guardian for incompetency or other dereliction of duty. These numerous and complicated provisions can have no possible application to those minors whose condition is orphanage

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and destitution. The guardian is not bound to support and maintain his ward from his own means. The law imposes upon him no such duty. He may provide for them from humanity, from the impulses of sympathy and charity. But the moment the ward's property and substance is exhausted the legal duty and obligation of the guardian is at an end, for he owes none which the law will enforce. If Thomas Kearney should abandon these helpless children, there is nothing for them but what the laws for the support of the poor may afford, or the charities of some such institution as that from which the order of the county judge has separated them.

The relator is an institution incorporated by the act of the 15th April, 1857. Its objects are purely charitable, and it is maintained by private beneficence, and designed to provide guardians or quasi guardians for those children of poverty and indigence who are left by obvious causes outside of the operation of the general law in relation to guardian and ward. In the language of the act of incorporation, the associates are constituted a body corporate, "by the name of the Brooklyn Industrial Association and Home for Destitute Children, whose object and business shall be to establish and support industrial schools, and to establish and maintain a home for destitute children in the city of Brooklyn." The 6th section of the act authorizes the surrender of infant children by their natural or other legal guardian to the care and management of the association, by an instrument or declaration in writing, and then proceeds to prescribe the duties of the association in respect to such children. Section 7 declares that upon the death, absence or incapacity of the father, the mother may make the surrender, and if she be dead or otherwise incapable, then the mayor of the city of Brooklyn, or the surrogate of the county of Kings, may perform the same office. The act contains ample and other provisions for the binding out and apprenticing of these children, and for their care, education and protection by the association, which it is not necessary to quote at large. The provision in the 6th section is a

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recognition of the ancient right of the father to provide a guardian for his infant child, by deed or will ; and the instrument in writing there referred to, by which the surrender is to be made to the association, is a substitute for the deed or last will mentioned in the 1st section of the act concerning guardians and wards, in cases where the poverty and indigence of the parents and children would leave the general act practically inoperative and unavailing. The instrument in writing by which the relators claimed the custody of the children was duly executed by their father, John Laffin, in the presence of two witnesses, on the 13th of December, 1858, and four days thereafter he died. The children remained with him until his death, and were then taken away by the relator. Thomas Kearney, who is their grandfather, caused himself to be appointed their guardian by the surrogate, on the 2d March, 1859, and on the 29th of March he sued out the writ of habeas corpus and instituted the proceedings under which they were, by the order of the county judge, taken from the custody of the relator and delivered over to the defendant on the 16th of May thereafter. The issue between the parties in the proceedings upon the return to the writ of habeas corpus, was the right to the custody of the children, and this depended upon the question whether the appointment of the general guardian, by the surrogate, superseded and rendered inoperative and void the appointment and surrender made by John Laffin, the father, to the relator, by the written instrument of the 13th December, 1858. The first two sections of the act concerning guardians and wards, and under which act the defendant Kearney derives his authority, were made in affirmation and assurance of the father's right to dispose of the custody and tuition of his infant children, during their minority, by deed or by his last will and testament. "A will merely appointing a testamentary guardian need not be proved, and though the statute speaks of appointments by deed as well as by will, yet such a disposition by deed may be revoked by will : and it is evident from the language of the English stat-

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ate, and from the reason of the thing, that the deed there mentioned is only a testamentary instrument in the form of a deed, and to operate only in the event of the father's death." (2 *Kent's Com.* 225.) The disposition which John Laffin made of his children was as valid and effectual as if it had been made under the first two sections of the general act, for it was made in exact conformity with the requisition of the 6th section of the act incorporating the relator, and the children were of the class which the act of incorporation was designed to protect and benefit. To give to the appointment of guardian by the surrogate under the general act the force claimed for it by the defendant, would be to impair the right of the father to dispose of the tuition and custody of his infant children, and virtually to set aside the wise and humane provisions of the act incorporating the relator. Besides, the surrogate's power and authority to appoint a guardian for an infant exist only where the father has failed to appoint by deed or will. (§ 4.) And although it may not be necessary to determine, upon this appeal, the question of the surrogate's jurisdiction, it is evident, I think, that the guardian he did appoint must hold whatever authority he has subject to the superior right of the relator to the care and custody of the children under the appointment and surrender made by the father in his lifetime. It occasionally happens that letters of administration are granted upon the estate of a deceased person when there is a will in existence, unknown and unproved, at the time, which disposes of the entire estate. Upon proof of the will the administrator, and all his rights and duties under the letters, are superseded by the will, and must yield to the superior right of the deceased in his lifetime to dispose of his effects through executors of his own appointment, at his own pleasure. So, also, it may occur that statutory guardians for infants may be appointed when there is a deed or will in existence appointing testamentary guardians for these same children, which may be undiscovered and unknown at the time. In this case, also, it cannot be doubted that the statutory

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guardians would be superseded, and their powers suspended, by the production of the deed or will appointing others to execute the same trusts.

It was said upon the argument that the decision of the surrogate, in awarding the letters of guardianship to the defendant, concludes the relator in the proceedings upon the habeas corpus. That the question is *res adjudicata*. There are two very sufficient answers, I think, to this proposition. To entitle the surrogate's adjudication to this weight, it must have been directly upon the point in controversy, and between the same parties, and the surrogate must have had cognizance and jurisdiction of the same question litigated in the proceedings upon the writ of habeas corpus. The first answer is that the relator was not and could not have been made a party to the proceeding before the surrogate. The surrogate's court is a court of special and limited jurisdiction, and must proceed to exercise its powers according to the letter of the statute from which it derives them. Its authority in regard to parties upon a petition for the appointment of a guardian, is to be found in the 5th section of the act. The parties other than the petitioner are limited to the relatives of the minor residing in the county. The person to whom the minor may have been apprenticed by indenture, or to whose care and custody he may have been committed by the deed or will of the father, cannot be made, nor can he make himself, a party to such an application, so as to be concluded by the judgment or decree, for the very obvious reason that the act has given the surrogate no such authority. It prescribes what he shall do, and who he may call before him to be bound and concluded by his decrees. The voluntary appearance of the counsel for the relator before the surrogate upon the hearing of Thomas Kearney's application, did not conclude or affect its right to the custody of the children. The next answer to the point of *res adjudicata* is that the right to the custody of the infant was not the question before, or determined by, the surrogate. His power was limited to an examination and determination

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into the fitness of the proposed guardian, the value of the infant's personal estate, and the rents and profits of his real estate, and to fix the amount and the sufficiency of the security to be given. The force and effect of the letters of guardianship, and the power of the guardian under them, was not a subject for the surrogate's consideration. They might or they might not invest the person appointed with a right to the control and custody of the infants, as the extraneous circumstances might happen to be. But that was not for the surrogate to settle. He issued the letters, and when the appointee came to assert rights under them, as against third persons standing in the situation of the relator, then those rights being purely incidental to the appointment, would become proper subjects for consideration and adjudication.

It was said upon the argument that the surrender mentioned in the 6th and 7th sections of the act incorporating the relator is intended to be a present act, and to place the association immediately in *loco parentis*. That the term surrender, *ex vi termini*, implies a present act. Strictly speaking this may be so, but it would be a most narrow and illiberal construction to apply the rule literally to this act which is purely charitable, and which in no possible contingency can interfere with the rights of property. Especially would this be so when the opposite construction does no more than give effect in another form to the father's right to appoint a testamentary guardian for his infant children. But concede its application, for the present, and what is there upon the face of the instrument of the 13th December, 1858, or in the evidence, to show that the surrender by John Laffin to the relator was not a present act? The instrument imports an absolute and immediate surrender. He was at the time it was executed in the last stage of an incurable disease, and was awaiting his dissolution hourly. He asked that his children might remain with him during the brief period that yet remained to him of life. To this last request of a dying father those representing the association assented. How could they do oth-

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erwise, and with what reason can it be said that suffering these little children to remain with their father for a few days or hours until he expired, and the last act of life was concluded and consummated, converted the transaction from a present to a prospective surrender?

Something is said in the opinion which accompanies the order appealed from, touching the incapacity of John Laffin at the time he executed the instrument of surrender ; but as there is no proof whatever to show such want of mental capacity, the counsel wisely omitted to refer to it upon the argument.

It is the duty of the courts to carry out the manifest intention of the legislature, and give effect to the humane and charitable provisions of the act which incorporates and creates the relator. But it must be evident to the most ordinary apprehension, that if the relatives of destitute orphan children, committed to its care and supervision by the written instrument of the parent, can retain and recover their custody under authority derived from the general statute concerning guardians and wards, the act of incorporation may in many cases be rendered nugatory and ineffectual to accomplish any useful or valuable purpose.

The proceedings and order of the county judge should be reversed, with costs, and restitution of the infant children awarded.

[DUTCHESS GENERAL TERM, May 14, 1880. *Lott, Emott and Brown*, Justices.]

VAN TASSEL and wife *vs.* VAN TASSEL and others.

It is a clear breach of public duty for a sheriff, in any case, to suffer the attorney of the plaintiff to take into his hands the proceeds of a sale and to deal with and dispose of them at his pleasure and at the time most suitable to his convenience.

In sales in actions for the partition of lands, the foreclosure of mortgages, or to carry the trusts of a will or deed into execution, where numerous other persons are interested, and entitled to share in the proceeds, besides the plaintiff, the officer falls in fulfilling his official obligations if he suffers the purchase money to pass into hands other than his own. *Per Brown, J.*

Whenever such a case occurs, the courts can do no less than hold the sheriff to a rigorous accountability.

Where a sale of lands under a decree in a partition suit was conducted and the lands were offered for sale, and sold, by the plaintiff's attorney, in the name of the under sheriff, the attorney delivering the deeds to the purchasers and receiving the purchase money, with the assent of the under sheriff, who was not present at the sale, but who subsequently executed the deeds, and signed the report of the sale; *Held* that the under sheriff must be deemed to have acted, in the matter, through the attorney, and to have ratified and affirmed all that he did touching the sale; and to have received the proceeds of the sale into his own hands, and to have incurred the usual liability therefor.

Held also, that the sale and conveyance of the lands mentioned in the judgment being an official act, the sheriff himself was liable to the parties entitled to the proceeds, for their respective shares thereof, upon a misapplication of the money by the attorney, to the same extent as if he had executed the judgment himself.

Although technically, and strictly, the words of the 22d section of the statute of limitations, respecting the time for commencing actions against sheriffs, &c. for official acts, do not apply to proceedings as for contempts to enforce civil remedies, yet in its spirit and intent that section does apply to such proceedings.

The court has the power to withhold, and should withhold, the exercise of its jurisdiction in summary proceedings on motion, whenever an action for the claim sought to be enforced is barred by force of the statute of limitations.

For the omission of a sheriff to pay over to the county treasurer the proceeds of a sale of lands in a partition suit, the period of limitation begins to run at the time the omission occurs, and not from the time when the party in interest becomes apprised of his right of action.

THIS was an application made by Susan Van Tassel, a defendant in this action, for an order that Benjamin D. Miller, formerly sheriff of Westchester county, make and file

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his report of his proceedings upon the judgment for partition in this action, subsequent to his report of sale; and that he distribute and dispose of the proceeds of the sale according to the terms of the judgment, or that an attachment issue. The motion was made at a special term held by Justice Lott, who denied the application, and the applicant appealed to the general term.

P. Y. Outler, for the motion.

B. H. Hart, for the sheriff.

By the Court, BROWN, J. Susan Van Tassel, one of the defendants in this action, applied to the special term, upon the usual notice, for an order that Benjamin D. Miller, former sheriff of the county of Westchester, make and file his report of his proceedings upon the judgment in this action subsequent to his report of the sale of the lands and premises mentioned in the said judgment; and also that he distribute and dispose of the proceeds of the said sale, according to the terms of the said judgment, or that an attachment issue against him. The real object of the motion was to compel the said former sheriff to pay over to the treasurer of the county of Westchester the one third part of the net proceeds of such sale which were by the terms of the said judgment directed to be paid over to the treasurer and by him invested at interest for the use and benefit of Susan Van Tassel, the moving party, during life, she being entitled to a life estate therein. The motion was heard by Mr. Justice Lott, sitting at the special term, and denied by him, from whose order in the premises she has appealed to the general term.

The parties in the action are the children and heirs at law, and the widow, of Robert Van Tassel, late of the county of Westchester, who died in September, 1849, seised of the lands which were the subject of the sale. The action was brought for a partition or sale of the lands, and the widow,

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Susan, was duly served with process to appear and answer, but she suffered the complaint to be taken as confessed. The proceedings were conducted by Charles A. Purdy, deceased, late of White Plains, as the attorney for the plaintiff. In April, 1851, the usual decree or judgment for a sale of the lands and premises by the sheriff of the county of Westchester was obtained from the special term of this court. The judgment also contained this direction—that the sheriff ascertain and report whether the defendant Susan Van Tassel is willing to accept, in lieu of her dower in the premises, a gross sum in satisfaction thereof, and that the sheriff pay such gross sum to her, upon her executing the usual release of her title and interest, &c. ; but in the event of her refusal to accept such gross sum, then he was directed to pay over to the county treasurer the one third part of the proceeds of the sale, to be invested by such treasurer at interest during her life, for her use and benefit. A part of the premises were sold upon the usual notice, on the 31st May, 1851, to Ezra Van Tassel, one of the defendants, for \$6202, and on the 6th March thereafter the residue of the lands were sold, upon the usual notice, to Wright Van Tassel, another of the defendants, for \$551. The purchase money was duly paid, in conformity with the terms of the sale, and deeds duly executed to the purchasers within a few days after the sales ; but the exact time does not appear from the papers. The execution of the deeds and the payment of the purchase money appear as well from the affidavits as from the sheriff's report of the sale, which was filed and confirmed on the 15th day of March, 1852. No report of the distribution has been filed, and the one third part of the purchase money in which the widow had an estate for life, has not been paid to the county treasurer, pursuant to the direction of the judgment. Charles A. Purdy was insolvent at the time of his death.

The other facts upon which the appeal must be determined are not open to any serious dispute. It does not appear, nor is it claimed, that Benjamin D. Miller, the sheriff, personally

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had any thing to do with the sale or the execution of the judgment. He was not present at the sale, received no part of the purchase money, did not sign or execute either of the deeds, and did not sign or file the report of the sale. Indeed he swears that he had no knowledge of the transaction, and first became acquainted with it after Charles A. Purdy's death, which occurred in January, 1858. The papers show that the sale was conducted and the lands offered for sale and sold by Charles A. Purdy, the plaintiff's attorney, in the name of John T. Yoe, the under sheriff of Benjamin D. Miller. The decree or judgment was not put into the under sheriff's hands. He was not present when the property was offered for sale, nor when it was struck off to the purchaser, nor did he receive into his own hands any part of the purchase money. But he arrived at the place of sale before the bidders and those in attendance separated, and upon being informed by Purdy that the lands had been sold, he immediately turned away and left the ground. Purdy received the purchase money and paid such of the parties as were paid their several shares. He prepared the deed or deeds and delivered them to the purchaser. In fact, except signing the sheriff's name, he did every thing in regard to the sale of the lands which the sheriff was required to do by the exigency of the judgment or decree. He also paid to the widow Susan Van Tassel (she not having released) the interest upon the one third part of the purchase money directed to be invested for her benefit, for several years and up to the time of his death, at the same time saying the same was paid over and invested at interest. The under sheriff, however, executed the deed or deeds of conveyance in the usual form, and tacitly if not expressly authorized Purdy to deliver them to the purchasers and receive the purchase money. He also, as under sheriff, signed the report of the sale and thus enabled Charles A. Purdy to put it on file and perfect the proceedings. After all this, it becomes a matter of no moment whether the under sheriff received the money or not. He must be deemed to have acted, in the premises,

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through Charles A. Purdy, and to have ratified and affirmed all that he did touching the sale. The judgment, in the form in which it was rendered, was incapable of execution by any other person than the sheriff. Purdy, in respect thereto, was as powerless as any other person, and without the concurrence and express assent of the sheriff, or the under sheriff, he could not have passed the title or touched a dollar of the purchase money. There is no rule of law which can be successfully invoked to exonerate him from being deemed to have received this money. Any other conclusion would result in wrong and injustice to others. It is a clear breach of public duty for the sheriff or a referee in any case to suffer the attorney for the plaintiff to take into his own hands the proceeds of a sale and to deal with and dispose of them at his pleasure and at the time most suitable to his convenience. In executions upon a common law judgment where the subject belongs exclusively to the plaintiff, little or no injury can result, because the plaintiff is in fact dealing with what is his own. But in sales in actions for the partition of lands, the foreclosure of mortgages, or to carry the trusts of a will or deed into execution, when numerous other persons are interested and entitled to share in the proceeds, besides the plaintiff, the officer fails in fulfilling his official obligations if he suffers the purchase money to pass into hands which are not his own. Whenever such a case occurs the courts can do no less than hold the sheriff or the referee to a rigorous accountability. In the present case the under sheriff, upon the most obvious principles, must be deemed to have received the proceeds of the sale into his own hands and to have incurred the usual liability therefor.

If the sale and conveyance of the lands mentioned in the judgment is to be regarded as an official act, as it certainly must be, then the sheriff himself is responsible to the party injured, and not the deputy or under sheriff. Whatever the under or deputy sheriff does under color of his office is deemed to be done by the sheriff himself. In *The People v. Brown*, (6 Cowen, 41,) the counsel for the sheriff submitted to the

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court whether he should not be discharged from an attachment for not returning a *fi. fa.*, on the ground that it had been delivered to the under sheriff who had collected the money under it. The court said: "The court look to the sheriff. They do not know the deputy, in this and the like proceedings. The sheriff must stand committed until the money and costs are paid." In *Walden v. Davison*, (15 Wend. 579,) Mr. Justice Bronson says: "In ascertaining whether the sheriff is answerable for the acts of his deputy, the question is whether the latter did an official or a mere personal act. If the act is personal only, and does not relate to his duty as an officer, he is not the agent or servant of the sheriff; but if he execute process under color or by virtue of his office, the sheriff is answerable for the consequences. When he acts by virtue of his office, third persons have a right to regard him as the mere agent or servant of another, and resort to the principal for the redress of any injury they may sustain. It would be a dangerous doctrine to hold that the sheriff may, for his own convenience, depute persons to discharge the duties of his office and yet not be answerable to third persons for their misconduct." It is quite well settled that in a case like the present the sheriff is liable to the same extent as if he had executed the judgment himself and did precisely what the under sheriff has done.

The more important, and, I apprehend, real impediment in the way of relief upon a motion for an attachment is the statute of limitations. "All actions against sheriffs and coroners upon any liability incurred by them by the doing of any act in their official capacity, or by the omission of any official duty, except for escapes, shall be brought within three years after the cause of action shall have accrued, and not after that period." (2 R. S. 224, § 22, 2d ed.) Technically, and strictly, the words of this section do not apply to proceedings as for contempts to enforce civil remedies, because it speaks of actions exclusively. But in its spirit and intent it does apply to such proceedings. Otherwise, in numerous instances,

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it would be wholly nugatory. This class of officers would find little benefit in an act which protected them from the consequences of an action and left them exposed to the more summary and severe remedy of a motion, with fine and imprisonment, perhaps, for the same cause. The act, like all other acts of limitation, is designed for peace and quiet, and to fix a period after which officers of the class designated shall not be vexed with actions and proceedings for acts and omissions of official duty. The court have the power to withhold, and should withhold, the exercise of its jurisdiction in summary proceedings on motion, whenever an action for the claim sought to be enforced is barred by force of the statute of limitations. In this way effect may be given to the manifest intention of the legislature. Before the revision of the statutes which took effect in January, 1830, the courts of equity were not within the words of the statutes of limitations; yet the statutes were admitted to be the rule in equity as well as at law in cases where these courts and the courts of common law had concurrent jurisdiction. (*Kane v. Bloodgood*, 7 *John. Ch. Rep.* 90. *Sousser v. De Meyer*, 2 *Paige*, 574, 577.) In *The People v. Everest* (4 *Hill*, 71) the defendant, late sheriff of Essex, was brought up on an attachment for not returning a writ of *feri facias*. The court said: "The statute of limitations is certainly not, *proprio vigore*, a bar to the imposition of a fine for the benefit of the plaintiff, even to the full amount of the sum indorsed upon the *fi. fa.* But we think that notwithstanding where the party lies by after the return day till an action for not returning is barred by the statute, damages for the omission ought not to be summarily awarded. The party should be left to his action upon the return."

It was said, upon the argument, that Susan Van Tassel, the widow, was guilty of no laches; that the rule should not be applied to bar her motion in this case, because she had made her motion as soon as she became aware the money in which she had an interest had not been paid to the county treasurer. I do not doubt that she first heard of the misap-

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propriation of the money after the death of Charles A. Purdy. But this is not a case in which the period of limitation does not begin to run until the party in interest becomes apprised of his right of action. The failure of the sheriff to return a writ, to file a report, or to pay over money to the county treasurer, is always within the knowledge of those interested, if they will take the trouble to examine for themselves. And if they omit to make the proper inquiry they are not free from laches. In the present case, Susan Van Tassel knew she had an estate in dower in the lands of her deceased husband. She was made a party to the suit in partition and was personally served with the process to appear and answer. She also knew the property had been sold and the purchase money paid, for she received from Charles A. Purdy her interest upon one third part of it for several years after sale and up to the time of his death. If she omitted to ascertain where the principal sum was invested, and how it was secured, it was an act of pure negligence, for which no one is legally responsible but herself. Had she brought the transaction to the notice of the former sheriff, or the court, during the lifetime of Purdy, there can hardly be a doubt that the money would have been promptly paid over to the proper officer.

For these reasons I think the order made at the special term should be affirmed, with \$10 costs.

[DUTCHESS GENERAL TERM, May 14, 1860. *Lott, Emott and Brown*, Justices.]

RACHEL S. ROGERS vs. W. L. BARKER and others

The 3d subdivision of section 14 of the act concerning boards of health, confers upon those boards the power to make regulations for the suppression and removal of nuisances, and must be construed to have reference to that class of nuisances which can be the subject of regulation.

Neither a dam, thrown across a stream, nor a collection of water in a reservoir created thereby, is a nuisance *per se*. The question of nuisance or no nuisance depends upon the presence or absence of various extraneous facts and circumstances. And it is proper that the existence of those facts and circumstances, and the question of nuisance, should be referred to the common law trial by jury; instead of being determined by a board of health, and property being summarily destroyed by its order, without compensation to the owner, and without an opportunity being given to him to be heard.

The legislature never designed to commit that unusual measure of power to the boards of health.

The rights of property, of every description, are qualified and restricted by the rule that they shall be so exercised as not to injure others. *Sic utere tuo ut alienum non laedas* is of universal application. But except in great and imminent emergencies the fact that they are injurious to others must be first established by the usual and customary proceedings of a trial in a competent court, before they can be taken away or destroyed.

Even if the power exists in boards of health to order property to be destroyed on the ground of its being a nuisance, and can be applied to the removal and destruction of a mill dam and a valuable water power used for manufacturing purposes, it is a power which must be exercised in subordination to the judicial authority of the state, and subject to be suspended and held in abeyance by the order of a court having jurisdiction of the subject, whenever the principal facts upon which its exercise depends are put in controversy and rendered doubtful, until they are established by due process of law.

If a board of health has authority and jurisdiction to determine the question of nuisance, and to order the suppression and removal of a dam as such, they should be required to state, in their adjudication, what the nuisance is—whether the dam itself, or the waters collected above the dam, and if the latter, how much of the structure shall be removed in order to dissipate and disperse the waters; and especially should the order or adjudication designate the particular dam or obstruction which they design shall be taken away.

Where a board of health, by resolution, declared and adjudged that the damming of the water in a particular river was "a dangerous nuisance, and detrimental to the health of the inhabitants," and then adjudged that all such nuisances be removed within three days; it was *held* that this was too vague, indefinite and uncertain to authorize the removal of a mill dam thrown across the river, by means of which the waters had been applied as a power for driving machinery, for more than sixty years.

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69th	138
31	447
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APPEAL by the defendants from an order made at a special term, granting an injunction against the defendants, according to the prayer of the complaint. The injunction enjoined and restrained the defendants from proceeding or acting upon certain resolutions passed by them as the board of health of the town of Mamaroneck, on the 24th of October, 1859, for the removal of nuisances in the Mamaroneck river caused by damming the waters thereof, and from injuring or in any way interfering with the property, lands, or real estate of the plaintiff or any part thereof, or disturbing her dam in or across the said river, or attempting in any way to reduce the amount of water in her mill pond.

J. W. Tompkins, for the plaintiff.

W. C. Noyes, for the defendants.

By the Court, BROWN, J. No question was raised upon the argument as to the case made by the plaintiff being a proper one for an injunction, provided she was entitled to the use and enjoyment of the waters of the Mamaroneck river, and to maintain a dam therein in the manner described in her complaint. The water privileges are of great value, and are actually applied to the uses of the manufacturing business. The threatened action of the defendants aimed at nothing short of their total destruction. The injury would therefore have been continuous and irreparable, and if the complainant had a right to any relief from the court it was by the process of injunction, to restrain the defendants from removing the dam until the right to maintain it could be considered and finally determined.

At the time the agreement of the 12th June, 1854, between Cleveland, Potter and Smith of the first part, and Jackson, Tompkins, Oliver, Shepherd and Palmer of the second part, was made, the former were the owners in fee of the premises embracing the mill dam and premises, with the right to flow

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with water the lands covered by the mill pond, subject, however, to the lien of the mortgage made by William Minott Mitchell and wife to Maria Banyer and Ann Say. It was entirely competent for them to enter into the agreement with the parties of the second part to that instrument, to take down the dam and to suffer the waters of the stream to flow downward without obstruction. They could bind themselves to the observance of any covenant of the kind, and all those who claimed title under them. But this was the extent of their powers. They could not bind the holders of the mortgage made to Maria Banyer and Ann Say, by a former owner, and long before Cleveland, Potter and Smith acquired any title, nor those who claim title under the mortgage. This is the condition of the plaintiff, Rachel S. Rogers. She holds by title acquired under the mortgage, and thus her right is paramount to that of Cleveland, Potter and Smith, and to that of any person who claims from them. The contracting parties, Jackson, Oliver, Tompkins, Shepherd and Palmer, saw all this at the time, for simultaneously with the execution of the agreement they took back to themselves from Cleveland, Potter and Smith a bond in the penal sum of \$11,000—just double the sum paid for the right to remove the dam and suffer the water to flow without interruption—conditioned to pay back the purchase money with the interest, in the event of any purchaser under a foreclosure of the mortgage restoring the dam and obstructing the free passage of the waters of the river. The agreement, therefore, and every thing which has been done under it, must be laid aside and not enter into the consideration of the question involved in the appeal.

So, too, with regard to the indictment found by the grand jury of the county of Westchester, in October, 1853. The dam then upon the premises was therein presented as a nuisance. The persons charged with maintaining it pleaded not guilty, and there the proceeding ended, except that a *nolle prosequi* was entered by the district attorney on the 19th of September, 1854. If this indictment could be regarded in any other light

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than one of the initiatory measures towards trying the question of nuisance, the question would still occur, what was the condition of these waters, and their effect upon the surrounding population, in October, 1853, when the old dam was in existence, and what was their condition and effect on the 24th October, 1859, the time when the defendants' resolution was adopted? That resolution, and the proceedings contemplated under it, had reference to the state of things at the time last named, and not to the condition of things six years previous thereto. What was a nuisance in 1853, in the opinion of the grand jury, may have become entirely inoffensive in 1859, after the erection of the new dam. The fact of the indictment being found cannot affect the present question.

The defendants justify their action, and claim the power to take down the plaintiff's dam, by virtue of their powers as the board of health of the town of Mamaroneck. The defendant William L. Barker is the supervisor, and the defendants Edward Seaman, William L. Carpenter and Isaac C. Taylor are the justices of the peace of that town. They assembled together on the 24th of October, 1859, and adopted a resolution constituting themselves a board of health for the town of Mamaroneck, and by another resolution they appointed the defendant Joseph Hoffman health officer of the board. Being thus constituted, they thereupon adopted another resolution, in the words following: "Resolved, that in the opinion of this board the damming of the water in Mamaroneck river is a dangerous nuisance, and detrimental to the health of the inhabitants of the town of Mamaroneck, and by authority vested in this board do hereby order and determine the removal within three days from the date of this notice all such nuisances." Notice of these proceedings, with a copy of the resolution or order of removal, the board immediately caused to be served upon the plaintiff. It may be safely taken for granted, I think, that the sole purpose of these proceedings is the removal of the plaintiff's dam and the discharge of the waters from the pond or reservoir which supplies and furnishes the power to

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the plaintiff's factory and mill upon the stream. This is certainly a most novel and extraordinary proceeding. In an action for the abatement of a private nuisance placed in the bed of a running stream, by which the waters are flooded upon the lands of other owners above, the judgment of the court would necessarily define with exactness and precision the identical obstruction which caused the nuisance, and the manner and extent to which it is to be reduced, so as to enable the officer to execute the judgment according to its exigency. With less certainty and precision than this, a judgment rendered in an action of nuisance would be incapable of execution. In the present case the resolution does not define what the obstruction is, nor what it is not. It does not declare how, or in what manner, it has become detrimental to the health of the inhabitants of the town, nor how much the obstruction is to be reduced in order to abate its dangerous and deleterious consequences. Surely, if this board of health have authority and jurisdiction to determine this fact of nuisance and to order its suppression and removal, they should be required to state in their adjudication what the nuisance is—whether the dam itself or the waters collected above the dam, and if the latter how much of the structure shall be removed in order to dissipate and disperse the obnoxious waters; and especially should the order or adjudication designate the particular dam or obstruction which they design shall be taken away. The board, however, have thought it right in this instance to execute such powers as they have by declaring and adjudging that "the damming of the water in Mamaroneck river is a dangerous nuisance, and detrimental to the health of the inhabitants," and then adjudging that all such nuisances be removed within three days from the date of the order of removal. The rights of property do not, certainly, depend upon proceedings so vague, indefinite and uncertain as these.

The authority for this action of the board of health of the town of Mamaroneck is thought to be found in the 3d subdivision of section 14 of the act concerning boards of health,

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(1 *R. S.* 851, 4th ed.) which empowers these boards "to make regulations in their discretion concerning the place and mode of quarantine; the examination and purification of vessels, boats and other craft not under quarantine; the treatment of vessels, articles or persons thereof; the regulation of intercourse with infected places; the apprehension, separation and treatment of emigrants and other persons who shall have been exposed to any infectious or contagious disease; the suppression and removal of nuisances; and all such other regulations as they shall think necessary and proper for the preservation of the public health." "A nuisance is that which worketh hurt, inconvenience or damage." (3 *Black. Com.* 216.) Common nuisances are a species of offenses against the public order and economical regimen of the state, being either the doing of a thing to the annoyance of the king's subjects, or the neglecting to do a thing which the common good requires. Common nuisances are such inconvenient and troublesome offenses as annoy the whole community in general, and not merely some particular person." (4 *Black. Com.* 166.) There are certain things which are nuisances *per se*, of which a ditch dug, or a fence placed across a public highway, or an obstruction put in the bed of a navigable stream, are examples. So are vessels, clothes and goods charged with the effluvium and infection of persons fatally diseased; also dead, decaying and putrid animal or vegetable matter. The class of which these last are examples are nuisances of themselves. They affect the public health, and may be suppressed and removed without serious or permanent injury to the owners of them. Their presence in cities and populous places may become the subject of municipal and sanitary regulation. The subdivision of the 14th section of the statute confers upon the boards of health the power to make regulations for the suppression and removal of nuisances, and the act must therefore be construed to have reference to that class of nuisances which can be the subject of regulation. There are certain things and employments which become nuisances not from any inherent and intrinsic

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offensive qualities of their own, but from matter extrinsic, such as the manner in which those things are used, and the manner and place where the occupations and employments are conducted. Certain trades which are entirely inoffensive in one place, may become nuisances when carried on in another. Neither a dam thrown across a stream of water, nor a collection of water in a reservoir created thereby, is a nuisance *per se*. On the contrary, they are sources of mechanical power, and tend to diffuse health and strength and comfort to large numbers of people. Reservoirs and collections of water by means of dams in the beds of running streams, for the purposes of manufactures and supplying cities and towns with water for public and domestic uses, are to be found every where throughout the state. They are ranked among the evidences of its civilization and progress in the useful arts. The water thus collected cannot in itself become detrimental and dangerous to the health of the population in the vicinity without other things combined, such as the presence of decayed and decaying vegetation, and its exposure in shallow basins to the evaporations of the summer heats. The question of nuisance or no nuisance depends upon the presence or absence of the extraneous facts and circumstances to which I have referred. Shall the decision of the boards of health that these extraneous facts and circumstances exist conclude the proprietors, and devote their property to destruction upon a three days' notice, without the opportunity to be heard? Or shall not the existence of those facts, and the question of nuisance, be referred as it always has been, to the common law trial by jury? It seems to me that there can be but one answer to this inquiry, and that is that the legislature never designed to commit this unusual measure of power to the boards of health. Besides, they are, as I have already said, "to make regulations in their discretion concerning the suppression and removal of nuisances." What sort of regulations can these boards make in regard to the numerous mill ponds, mill streams, mill dams, basins and reservoirs of water, spread over the surface

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of the state? Are they to prescribe their dimensions and depth, how much water they may safely contain, when they are to be drawn down, and when they may be refilled without detriment to the public health? It is manifest that this class of objects are not susceptible of the regulation contemplated by the statute, nor of any regulation consistent with the rights of property which the boards of health could prescribe. The papers show, indeed it is not disputed, that the waters of the Mamaroneck river, by means of the dam and reservoir which it is the purpose of the defendants to remove, have been applied as a power for driving machinery for more than 60 years, with but little interruption. They are still used for that purpose, and yield to the plaintiff a large annual rent. These rights and privileges are property of the most valuable kind. The resolution of the defendants contemplates and intends nothing short of the total destruction of this property, without compensation to the owner, without notice of the proceedings by which it is devoted to destruction, without the judgment of any judicial tribunal, and without the due process of law mentioned in the 6th section of the 1st article of the constitution. If the act in regard to boards of health is susceptible of any such construction, which it certainly is not, the judicial department of the government cannot suffer it to be executed. The rights of property of every description are qualified and restricted by the rule that they shall be so exercised as not to injure others. *Sic utero tuo ut alienum non lædas*, is of universal application. But except in great and imminent emergencies the fact that they are injurious to others must be first established by the usual and customary proceedings of a trial in a competent court, before they can be taken away or destroyed.

We have been referred to some authorities in our own courts, in affirmation of the powers claimed by the board of health. *Stuyvesant v. The Mayor &c. of New York*, (7 Cowen, 588,) affirmed the power of the mayor and common council to prohibit by their by-laws interments within certain parts of the

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city, under a penalty even against persons having rights of interment by grant for more than a century. It was held that these rights of property must be held in subordination to the power of the local authorities to make regulations in respect to the public health. But the action was brought to recover the penalty, and did not involve the right of the corporation to destroy or remove property in a summary way. *Hart & Hoyt v. The Mayor, Aldermen and Commonalty of the City of Albany*, (9 *Wend.* 571,) affirmed the power of the corporation to remove from the basin in front of that city a floating store house for receiving and delivering goods which the plaintiffs had moored therein without grant, which permanent appropriation and exclusive occupation of a portion of a public river the court of errors held to be a public nuisance which might be removed and abated without indictment. This permanent obstruction in a navigable river or basin was a nuisance *per se*. The case of *Van Wormer v. The Mayor &c. of Albany*, (15 *Wend.* 262,) was an action of trespass for tearing down the barn and sheds of the plaintiff. The defendants justified under a by-law of the corporation reciting that the grounds upon which the buildings stood had been adjudged by the board of health to be a nuisance dangerous to the health and lives of the inhabitants. The removal was made during the prevalence of the Asiatic cholera, in the summer of 1832. The circuit judge decided that the justification was made out, upon the trial; whereupon the plaintiff submitted to a nonsuit which he afterwards moved to set aside. The case, in some of its aspects, resembles the present; but it will be seen that the principal question presented here did not arise, or if it did, was not examined and decided. Chief Justice Savage, in the opinion denying the motion to set aside the nonsuit, says: "Although no technical notice was given for the plaintiff to show cause, at the time when the premises were adjudged a nuisance, yet he had often had notice substantially; had appeared before the board and admitted the character of the premises and the necessity for digging them down, but

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contended it should not be done at his expense, as he was but lessee." The case came up for re-examination in the court of errors, (18 *Wend.* 169.) The chancellor delivered the opinion, and he held that under the pleadings the plaintiff had no right to dispute the existence of the nuisance, which he said no one thought of denying. The case of *Meeker v. Van Rensselaer*, (15 *Wend.* 397,) was also an action of trespass for pulling down five dwelling houses in the city of Albany during the prevalence of the Asiatic cholera in 1832. The premises were originally erected as a tan house, 70 feet long by 12 high, and was divided into apartments and inhabited by some fifty emigrants. Beneath the floors of the building were twenty tan vats, filled with stagnant putrid water, which oozed through the floors. The premises were otherwise in a most filthy and offensive condition, and some of the inmates were dead, and others dying, at the time the building was taken down. The defendant justified under an order of the board of health of the city, declaring the premises a nuisance, and directing it should be abated. He had a verdict, which the plaintiff afterwards moved to set aside. The grounds of the motion related to exceptions taken to the decisions of the judge in regard to the evidence. The question of nuisance did not arise. Chief Justice Savage says, in rendering his opinion, "It was not denied upon the trial that the building torn down was a common nuisance, nor was it upon the argument." None of these cases determine the question presented on this appeal, and we have not been referred to any that does. One conclusion, I think, may be safely adopted, that if the power asserted in the defendant's resolution really exists, and can be applied to the removal and destruction of property like that described in the complaint in this action, it is a power which must be exercised in subordination to the judicial authority of the state, and subject to be suspended and held in abeyance by the order of a court having jurisdiction of the subject, whenever the principal facts upon which its exercise depends are put in controversy and rendered doubtful, until they are established by due

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process of law. This is precisely the ground upon which the order of injunction at the special term was granted.

It should be affirmed with ten dollars costs.

[DUTCHESS GENERAL TERM, May 14, 1860. *Lott, Emott and Brown, Justices.*]

SCHOONMAKER, ex'r of Van Wyck, vs. VAN WYCK, ex'r, &c.

31	457
78h	190
81	457
82h	147

The real and personal estate of a testatrix were, by her will, directed to be converted into money by her executors, and after the payment of debts, &c., the proceeds were disposed of as follows: One third part was given to E. S.; one third part to M. S., the executor, in trust for S. V. S. and her children; and the remaining third part was directed to be put at interest on bond and mortgage, or otherwise securely invested, during the lifetime of J. J. V., and the net annual income thereof paid over to him during his life, with remainder over, of three-fourths thereof, to her nephews, F., J. and S., and of one-fourth part thereof to her surviving executor, in trust for J. V. W. The inventory of the personal estate made April 10, 1845, included a mortgage, given by one W. on certain lots at Harlem, on which there was due the sum of \$1612.31. This mortgage the executors proceeded to foreclose, and bid the same in for the sum of \$750, at the master's sale, and took a deed therefor, April 18, 1846. In April, 1859, the executors sold the lots, and realized from the sale \$8451, over and above all expenses, &c.

Held, 1. That the sale of the property to the executors, under the decree in the foreclosure suit, effected no change in the nature of the property, so far as the executors, distributees and *cestuis que trust* were concerned; and that although the title was absolute in the executors, they held it precisely as they held the mortgage security.

2. That the sum of \$8451, realized by the executors from the sale of the mortgaged premises, was, after deducting the executors' commissions, to be applied as follows: 1st. To replace the sum of \$1612.31 which the Harlem lots owed to the principal of the estate, one third part of which was the property of E. S.; one third part to remain with M. S. as trustee for S. V. S. and her children; and the remaining one third was to be invested at interest for the use of J. J. V. during life, with remainder over, &c. 2d. That from the proceeds of the sale there should next be taken the interest upon the sum of \$1612.31 from April 10, 1845, and one third part thereof paid to E. S.; one third part to M. S. trustee for S. V. S. and her children; and the remaining third part paid to J. J. V. for his own use, and in satisfaction of

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his interest in the income of the fund. 3d. That whatever should remain, after these deductions and payments, and after paying the costs, was to be regarded as a part of the principal of the estate, and should be appropriated in the same manner as before directed in respect to the principal sum of \$1612.81.

CASE submitted for the opinion of the court, as to the disposition to be made of a fund realized by executors from the sale of real estate. The rights of the several parties claiming an interest in the fund depended upon the construction of the will of the late Elizabeth Van Wyck, deceased.

M. Schoonmaker, in person.

Joseph I. Jackson, for Sidney and I. I. Van Wyck.

Henry Angevine, for Isaac I. Van Wyck.

By the Court, BROWN, J. The real and personal estate of the testatrix Elizabeth Van Wyck were to be converted into money by her executors, and after the payment of debts, funeral expenses and expenses of administration, the proceeds are by the will disposed of as follows: One third part thereof is given to Elizabeth, wife of the plaintiff Marius Schoonmaker. One third part is given to the executor, Marius Schoonmaker, in trust for Sarah D. wife of Cornelius Van Santvoord, and her children. The remaining third part is directed to be put at interest on bond and mortgage, by her executors, on real estate, or otherwise securely invested, during the lifetime of the defendant Isaac I. Van Wyck, and the net annual income thereof paid over to him annually during his life, when received by her executors, with remainder over of three-fourths thereof to her nephews Frederick E. Westbrook, Joseph Jackson Van Wyck, and Sidney Van Wyck; and of one-fourth part thereof to her surviving executor, in trust for her nephew, Isaac V. W. Westbrook. There are some other limitations

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and directions in regard to these shares, which are not material to the question submitted by the papers.

The inventory of the personal estate was taken on the 10th day of April, 1845, and the estimated value of the Archibald Watt mortgage was \$1612.31, that being the amount of the principal and interest. Had this money been collected by the executors within the eighteen months given by the statute for the settlement and distribution of the estate, it would have constituted a portion of the fund to be divided and distributed as principal, and no part of it as income; that is to say, one third part of it would have been invested at interest by the executors under the third provision of the will, in the order in which I have stated them, and the net annual income paid to Isaac I. Van Wyck annually during his life, as such income was received by the executors. The executors were trustees, and this mortgage, and whatever was realized by them, was trust property, to be applied to the uses of the will. The collection of the money might be procrastinated and postponed to a distant day. This, however, could not change the rights of the *cestuis que trust*, or the obligation of the trustees to devote the proceeds of the chose in action to the uses which the testatrix had indicated by her will. This mortgage, it seems, the executors proceeded to foreclose, but failing to find a purchaser for the mortgaged premises, at their fair value, the executors themselves became the purchasers, and acquired the title of the mortgagor, under the master's deed of the date of the 18th of April, 1846. The premises consisted of fifteen lots of ground at Harlem, in the city of New York, and the price at which they were struck off to the executors at the sale was \$750. This sale effected no change in the nature of the property so far as the executors, distributees and *cestuis que trust* were concerned, and the sum at which the property was bid in is of no moment in the present litigation. Although the title was absolute in the trustees, they held it precisely as they held the mortgage security. In April, 1859, the fifteen lots of land were sold by the execu-

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tors and converted into money. There was realized therefrom, after the payment of all expenses for taxes, assessments and expenses of sale, the sum of \$8451. This amount is of course subject to the executors' commissions, and is to be applied to the following uses: 1st. To replace the sum of \$1612.31 which the fifteen lots of ground owed to the principal of the estate, one third part of which is the property of Mrs. Elizabeth Schoonmaker; one third is to remain with Marius Schoonmaker, as trustee for Mrs. Sarah Van Santvoord and her children; and the remaining one third is to be invested at interest for the use of Isaac I. Van Wyck during life, with remainder over, &c. 2d. From the proceeds of the sales of the lots of ground there is next to be taken the interest upon the sum of \$1612.31 from the 10th of April, 1845, to the time of entering this judgment, and one third part thereof paid to Mrs. Elizabeth Schoonmaker; one third part thereof to Marius Schoonmaker, trustee for Mrs. S. Van Santvoord and her children; and the remaining third part thereof paid over to the defendant, Isaac I. Van Wyck, for his own use and in satisfaction of his interest in the income of the fund. Whatever shall remain of the proceeds of the fifteen lots of ground, after these deductions and payments, and after paying therefrom the costs of this submission, is to be regarded as a part of the principal of the estate, and shall be appropriated in the same manner as is hereinbefore directed for the appropriation and distribution of the principal sum of \$1612.31.

Judgment will be entered in conformity with this opinion, and the costs of the parties will be paid out of the fund.

[DUTCHESS GENERAL TERM, May 14, 1860. *Lott, Emott and Brown*, Justices.]

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31	461
121a	205
31b	461
48ad	321

It is clearly libelous to publish of another that he is "insane, and a fit person to be sent to the lunatic asylum;" or that "he is so disordered in his senses as to endanger the persons of other people, if left unrestrained, and that it is dangerous to permit him longer to go at large."

The libelous character of such language will not be destroyed, or diminished, by the fact that the person uttering it is a *physician*, and makes the statement as a professional opinion.

To give to a statement made by a physician, which would otherwise be criminal and libelous, a privileged character, he must not only utter it as a medical man, but it must be made in the discharge of a duty, and to a person having a corresponding duty in reference to the subject matter.

A complaint alleging the publishing of words charging the plaintiff with being insane, without lawful authority or justification on the part of the defendant, need not aver special damage to the plaintiff. The obvious import and effect of such a charge being degrading and injurious, the court needs no averments to point out its tendency.

In England, and in the courts of this state, the rule has been very steadily adhered to which protects parties and witnesses for statements pertinently made by them in the assertion of their rights, or the discharge of their duties as such.

It seems this protection is not confined to the trial of issues in suits, or indictments, or to oral examinations, so as to exclude affidavits even if voluntarily made, if otherwise regular and pertinent.

Whenever a person testifies, either voluntarily or under process of subpoena, to matters pertinent and material, in a proceeding before a court or magistrate of competent authority, he is entitled to unqualified protection against any action for defamation by the words thus uttered.

It is not libelous, or actionable as such, for a physician to furnish evidence, either voluntarily or under a subpoena, that another is insane, in a proceeding duly taken under any of the clauses of the statute relative to the safe keeping and care of lunatics.

To sustain a demurrer to a complaint for libel uttered under such circumstances, it is necessary that it should appear distinctly, by the complaint, that the alleged libel was contained in an affidavit made in a proceeding properly and legally instituted under the statute referred to. The complaint must state all the facts which the defendant would be obliged to plead in setting up his privilege; in order to show that the plaintiff has no cause of action in the publication of a charge which in itself is clearly libelous.

Although, where a man is called to testify, or even makes an affidavit, in a cause depending in a court of competent general or ordinary jurisdiction and proceeding according to the course of the common law, he may not be required to know, or to prove, that all the facts existed, or all the steps had been taken, which were necessary to confer jurisdiction in the particular case,

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yet where one intervenes voluntarily, in a special proceeding not known to the common law and not resulting in a judgment according to its forms, he must see that jurisdiction is acquired, and that there is in reality a proceeding in court, before he can claim the privilege of a witness for libelous charges against another

A PPEAL from an order made at a special term, overruling a demurrer to the complaint. The complaint was as follows:

First. That at the times hereinafter mentioned, and for some time previous thereto, the plaintiff was a resident of the city of Brooklyn, and was engaged in the business of commission merchant and ship chandler, at No. 39 South street, in the city of New York, and was deriving profits and emoluments therefrom, for the support of himself and his family.

Second. That on or about the 4th day of December, 1858, at the city of Brooklyn aforesaid, the said defendant, well knowing the premises, published a certain false, malicious and defamatory libel of and concerning this plaintiff, in the words and figures following, to wit:

"City of Brooklyn, County of Kings, ss. We, Chauncey L. Mitchell, M. D. and William H. Dudley, M. D. of the city of Brooklyn, in said county, physicians, duly licensed to practice as such, according to the laws of the state of New York, do certify that we have examined into and are acquainted with the state of health and mental condition of Joseph Perkins (this plaintiff meaning) of the city of Brooklyn, in said county, and that he (this plaintiff meaning) is, in our opinion, insane, and a fit person to be sent to the lunatic asylum.

Dated December 4, 1858.

(Signed) CHAUNCEY L. MITCHELL, M. D.
WILLIAM H. DUDLEY, M. D."

"County of Kings, ss. Chauncey L. Mitchell, of the city of Brooklyn, in said county, being duly sworn, says, that he is acquainted with Joseph Perkins, of said city, (the plaintiff meaning,) and that he is disordered in his senses, and has been so for some time past; and that he (the plaintiff meaning) is,

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in this deponent's best judgment and belief, so disordered in his senses as to endanger the persons of other people, if left unrestrained, and that it is dangerous to permit him (this plaintiff meaning) longer to go at large.

(Signed) CHAUNCEY L. MITCHELL, M. D.

Sworn before me this 4th day of December, 1858.

F. Q. DALLON, A. G. HAMMOND,

Justices of the peace, Kings county."

Third. That on or about the 4th day of December, 1858, the said defendant presented the said certificate and affidavit to the said justices of the peace, who thereupon, and in consequence thereof, on the same day issued their certain warrant of commitment, a copy whereof was annexed.

Fourth. That in pursuance of the precept of the said warrant, the plaintiff was forcibly taken from his own house on the evening of the 4th day of December, 1858, and conveyed to the lunatic asylum in the town of Flatbush, and there imprisoned for the space of four days.

Fifth. That by reason of the publication by the defendant of the said false, malicious and defamatory words, the plaintiff had sustained great injury to his good name, fame, credit and character, and that the said business of the plaintiff had been specially and largely injured by the circulation of the report that he was a lunatic, unfit to discharge his duties as a business man, and dangerous to the lives of other people, to the damage of the plaintiff of the sum of \$50,000. Wherefore he demanded judgment against the defendant for that sum, with costs.

The defendant demurred generally, on the ground that the complaint did not state facts sufficient to constitute a cause of action.

A. J. Willard, for the plaintiff.

L. Birdseye, for the defendant.

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By the Court, EMOTT, J. The first, and a very material subject of inquiry in this case is, the character of the injury for which this action is brought. Is it for libel or defamation, or for a malicious prosecution, or for false imprisonment? The plaintiff's counsel contends that his complaint is good in either of these aspects. There is nothing, however, in the case stated by the complaint to sustain a suit against the defendant for a malicious prosecution. It does not allege that the defendant commenced or instigated the prosecution against the plaintiff, if the proceedings mentioned in the complaint are to be regarded as such; nor that these proceedings were malicious and without probable cause; nor that they have been finally terminated. Without these essential elements no action for a malicious prosecution can be maintained. The complaint is equally deficient in the charges upon which a suit for a false imprisonment would lie. The defendant was not actually engaged or assisting in the detention of the plaintiff; nor did he even prefer the complaint upon which the latter was restrained of his liberty. The only part which he is alleged to have taken is the making a certificate and deposition as a part of the proceeding. Besides, it is not alleged that the arrest was illegal, or the process void. In addition to these considerations, it may be observed that the injury and damage alleged in the complaint is charged to have been sustained exclusively from the publication of defamatory matter affecting the plaintiff in his character and his business. Clearly this action can be sustained only as an action for a libel, and we shall proceed to consider it as such.

The complaint states that the plaintiff at the time of the publication was a merchant; that the defendant, on the 4th of December, 1858, published of the plaintiff a false, malicious and defamatory libel, which is then set out at length. It consisted of a certificate signed by the defendant and another person, stating that they, being physicians, "have examined and are acquainted with the plaintiff's health and mental condition, and are of opinion that he is insane and a fit person

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to be sent to the lunatic asylum." To this is added an affidavit signed by the defendant alone, to the effect that he is acquainted with the plaintiff, and that the plaintiff "is disordered in his senses, and has been so for some time past;" and that he is "so disordered in his senses as to endanger the persons of the people, if left unrestrained, and that it is dangerous to permit him longer to go at large." The complaint proceeds to allege that the defendant "presented the said certificate and affidavit to the said justices of the peace," meaning, I presume, two persons whose names appear at the foot of the affidavit as having administered the oath to the defendant; that they, in consequence thereof, issued a warrant by which the plaintiff was forcibly taken and confined in the lunatic asylum for four days. The complaint concludes with the ordinary allegation of damage to the plaintiff from the publication of the libel, both in his character and his business. The defendant demurred to this complaint; his demurrer was overruled in the city court, and he has appealed to this court from the order overruling it.

It is clearly libelous to publish of another that he is "insane and a fit person to be sent to the lunatic asylum;" or that "he is so disordered in his senses as to endanger the persons of other people, if left unrestrained; and that it is dangerous to permit him longer to go at large." There is no definition of libel which has ever been received by the courts which will not include such a charge. It is a censorious and ridiculing writing, and if untrue it will ordinarily be inferred to have been made with a mischievous and malicious intent towards the individual named; which are the conditions of Gen. Hamilton's celebrated definition in the *Croswell* case, (3 *John. Cas.* 337, 354; 9 *John.* 215.) It sets the plaintiff in an odious light, and exposes him to public contempt and aversion, which is Blackstone's rule. (3 *Comm.* 125. 4 *id.* 150.) It is unnecessary to multiply definitions; upon this point, the case is clear. (See *Lord Coke* in 5 *Rep.* 125; *Ld. Holt*, 3 *Salk.* 226; and 1 *Starkie on Slander*, 153.) Nor is

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the libelous character of the language destroyed or diminished by the fact that the defendant is a physician, and makes the statement as a professional opinion. It is rather an aggravation of such a charge that it is backed by the professional skill and authority of a medical man. Can it be doubted that if a physician should, without cause or justification, wantonly write and publish a statement that a man was insane, dangerous and unfit to be at large, and that such was his opinion as a medical man, he would be liable to an action for a libel. There is no rule of law which will protect an individual in the utterance of libelous charges against another, merely because the utterer occupies a professional position and possesses professional skill and experience. To give to a statement made by a physician, which would otherwise be criminatory and libelous, a privileged character, he must not only utter it as a medical man, but it must be made in the discharge of a duty, and to a person who has or is engaged in a corresponding duty in reference to the subject matter. (*Harrison v. Bush*, 32 Eng. L. and E. Rep. 173. *Van Wyck v. Aspinwall*, 17 N. Y. Rep. 190.)

It is also erroneous to suppose that a complaint alleging such a publication as that under consideration without lawful authority or justification is defective unless it aver special damage to the plaintiff. We do not purpose to consider how far the present complaint contains averments of special damage, or to what extent the arrest and detention of the plaintiff can be pleaded or proved as damages resulting from the publication of the libel. It is sufficient to say that the only cases in which it is necessary in order to sustain an action for defamation, to allege the manner in which the publication has injured the plaintiff, are cases where it is of such a character that the court cannot see that its tendency and effect would be to defame or degrade the plaintiff, or to render him odious or contemptible. This is the rule given by Chancellor Walworth in the court of errors, in *Cooper v. Stone*, (2 Denio, 299,) and recognized by all the cases. The obvious import

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and effect of such a charge as that now before us is degrading and injurious, and we need no averments to point out its tendency. We must therefore look to another part of the case to sustain this demurrer.

The question upon which the case must ultimately turn is whether the affidavit and certificate of which the plaintiff complains were privileged communications. The defendant contends that they were, and that the facts and circumstances which confer upon them that character sufficiently appear in the complaint. It was upon this ground that the demurrer was mainly, if not entirely, founded.

The authorities, both in England and in the courts of this state, clearly recognize two classes of privileged communications. In one the party is protected from civil or criminal responsibility for his statements, whether spoken or written, although untrue, unless he is proved to have been actuated by a malicious design in making them. To this class of cases belong complaints preferred in the proper quarter against public officers; statements in regard to the character of a servant, given by a master upon inquiry; confidential communications upon matters of business, between parties having a mutual interest; statements made in the discharge of a public or official duty; and other publications of a similar nature. The occasion of the speech or writing, and the position of the person by whom it is uttered, in these instances, repel the presumption or inference of malice which the law justly and wisely attaches to a false and injurious accusation where it is gratuitously made. But the party injured may nevertheless prove, if he is able to do so, that the charge which has been published even upon such an occasion, was not only false in fact, but malicious in motive. If he can establish express malice he may recover as in other cases, notwithstanding the conditional privilege. (*See Thorn v. Blanchard*, 5 *John.* 508; *O'Donaghue v. McGovern*, 23 *Wend.* 26; *Vanderzee v. McGregor*, 12 *Wend.* 545; *Somerville v. Hawkins*, 3 *Eng. L. and E. Rep.* 503; *Harrison v. Bush*, 32 *id.* 173; *Van Wyck*

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v. *Aspinwall*, 17 N. Y. Rep. 190; *Lewis v. Chapman*, 16 id. 369.) In *White v. Nichols*, (3 How. U. S. Rep. 266, 284,) Mr. Justice Daniel endeavors to show that this is the extent to which words spoken or written are protected by any occasion, and that there is no case in which an action for slander or libel will not lie for a false and criminary statement, however or whenever made, provided the person making it is shown to have been actuated by express malice towards the party accused. The case in which this opinion was delivered was an action for a libel contained in a communication to the secretary of the treasury, asking the removal of a collector of customs. It was therefore a case belonging to the class just referred to, and in which the privilege of the party only will protect him for an unfounded statement if his motive be honest and not malicious. But the reasoning of Judge Daniel's opinion, and the propositions which he deduces where he goes beyond the case in hand, are clearly unsustained by principle or authority. There is another class of communications to which much greater immunity is attached in the law, and for which a party is protected from any action for damages on account of their defamatory character or effect. These are words spoken or written in the due course of parliamentary or judicial proceedings. In the case of judicial proceedings, which is all that is material now, words spoken or written by a party, by counsel, by a judge, a juror or a witness, although false, defamatory and malicious, are not actionable if they were uttered in the due course of the proceeding, in the discharge of a duty, or the prosecution or defense of a right, and were pertinent and material to the matter in hand. It is unquestionable that a person who institutes a groundless proceeding, whether civil or criminal, against another, upon false or defamatory charges, is liable to an action for the injury he occasions. But that the action must be for the malicious complaint, indictment or action, and not for the words. (See *Cowen, J. in O'Donaghue v. McGovern*, 23 Wend. 26; *Starkie on Slander*, 193.) This doctrine is also to be found in the

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chancellor's opinion in *Hastings v. Lusk*, in the court of errors; (22 Wend. 410,) and the distinction between this and the other class of privileged cases is very clearly pointed out by him. Where the words are uttered by counsel, or a witness, or a judge, the protection is, if possible, yet more absolute. Unless such persons can be connected directly with the prosecution, as instigating or promoting it with malicious motives, they are entitled to entire immunity for what they say and do in their several places, and in the discharge of their respective duties in a cause. There is but one limitation to their protection, and that is that they should not go beyond the cause and the parties, or what is pertinent and material to them. *Ring v. Wheeler*, (7 Cowen, 725,) and *Gilbert v. The People*, (1 Denio, 41;) are instances of the application both of the rule and its limitation; and in the latter case Judge Beardsley defines the doctrine with precision, and recognizes the absolute and unqualified protection of what is said or written in a judicial proceeding, if it be pertinent and material, against an action and against the allegation or proof of malice in the party uttering it. In the case of witnesses who are compellable to appear and to testify, it would indeed be intolerable that their motives and feelings should be scrutinized, and they subjected to liability for statements which they could not avoid making under the direction of the court before whom they appear. Persons testifying in a court of justice are not liable to an action for any statements which they make under the examination to which they are subjected, and in reply to questions permitted by the court or magistrate.

The principles which have now been stated are sustained by the whole series of authorities, from the earliest to the latest. *Lake v. King*, (1 Saund. 120, 132,) is a case where the proceeding was in parliament, and although somewhat questioned in some later cases, the decision was recognized as law by Ld. Mansfield, in *Astley v. Younge*, (2 Burr. 810.) That was a case of an alleged libel contained in an affidavit in a proceeding in the king's bench. Lord Mansfield put it to the counsel

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to "show that a matter given in evidence in a court of justice may be prosecuted in a civil action as a libel," and judgment was given for the defendant on demurrer, on the ground of the privileged character of the publication. In the celebrated case of *Rex v. Baillie*, (21 *State Trials*, 1,) which was also before Lord Mansfield, Mr. Erskine, in his memorable speech, asserted the rule broadly. "A man," he said, "cannot be guilty of a libel, who presents grievances before a competent jurisdiction, although the facts he presents should be false; he may indeed be indicted for a malicious prosecution, and even then a probable cause would protect him, but he can by no construction be considered as a libeler." Lord Mansfield, in giving judgment, recognizes "the distinction taken at the bar as sound and well founded," and adds, "in a proceeding in a court of justice of the parties nothing can be a libel;" and alluding to an affidavit in a judicial proceeding, as in the case of *Astley v. Young*, which he cites, he says, "it was not the subject matter of an action or a prosecution, if it was really so used in the course of a judicial proceeding." There is a case of *Hodgson v. Scarlett*, reported in 1 *B. & Ald.* 232, which was an action against that noted barrister, afterwards Ld. Ch. Baron Abinger, for words spoken in an address to the jury in the trial of a cause. In this case the opinions of some of the judges are somewhat qualified and hesitating, as if proof of express malice would take away the privilege. But the point was not distinctly presented, and it may be inferred, I think, from the expressions used by these judges, that proof of the pertinency of a statement used on such an occasion would rebut any proof of malice. The term maliciously is used in a legal sense, as implying that the party had traveled out of his way and his duty, from private enmity, to asperse another whose character was in nowise concerned. In *Ring v. Wheeler*, (7 *Cowen*, 725,) already referred to, the question arose on a motion in arrest of judgment, and the court held that they were bound to infer, after verdict, that the words were false, were uttered willfully and maliciously, and were

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irrelevant, and therefore refused to arrest the judgment. In *Allen v. Crofoot*, (2 *Wend.* 515,) a verdict was set aside which had been recovered for words spoken by the defendant before a magistrate, in answer to a question by the plaintiff, who had been arrested by a warrant upon a sworn complaint. The court held, Mr. Justice Marcy giving the opinion, that whether the words were or were not spoken in the course of the proceeding upon the defendant's complaint, or under circumstances to induce him to believe that it was necessary for him to repeat the charge contained in his complaint, should have been submitted to the jury. In *Garr v. Selden*, in the court of appeals, (4 *Comst.* 91,) the alleged libel was an affidavit made by the defendant in resisting a motion to strike out a notice annexed to his plea, in an action brought against him by the plaintiff. The court held that if the affidavit were pertinent to the motion, the law did not permit a party to question its truth or innocency in an action for libel, or to allege in that form of action, that it was false or malicious.

These cases leave no room to doubt that in England and in the courts of this state, the rule has been very steadily adhered to which protects parties and witnesses for statements pertinently made by them in the assertion of their rights, or the discharge of their duties as such. I see no reason why this protection should be confined to the trial of issues in suits or indictments, or to oral examinations, so as to exclude affidavits even if voluntarily made, if otherwise regular and pertinent. The phrase employed by the judges and the text writers, in speaking of this sort of privileged communications, is "judicial proceedings." This is not confined to trials of civil actions or indictments, but includes every proceeding before a competent court or magistrate in the due course of law or the administration of justice, which is to result in any determination or action of such court or officer. Thus in *Allen v. Crofoot*, (*supra*,) the proceeding was a preliminary examination before a justice of the peace on a complaint for larceny or burglary. In *Astley v. Younge*, (2 *Burr.* 807,) also cited

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above, the statement complained of was contained in an affidavit made to resist an application to the court of king's bench to compel the justices of Wiltshire to license an innkeeper. In *Captain Baillie's case* the libelous charges were in a memorial submitted to the governor of Greenwich hospital. It is very clear, I think, that the privilege or protection extended by the law to this class of cases must be commensurate with the liability of the party commencing or instigating the proceeding to an action for a malicious prosecution, and that of the person testifying, to an indictment for perjury. Nor is the privilege to be confined to testimony obtained as it were upon compulsion, by legal process. We are in the daily habit of receiving and acting upon statements made in affidavits sworn to by parties who have not been compelled to testify. It is necessary, in many cases, to the due and efficient administration of justice, that such affidavits should be made and the persons making them should be protected; otherwise we should constantly be compelled to issue process and take examinations which we now receive more easily and speedily by the voluntary action of the parties. There might be cases where the necessity of resorting to proceedings apparently *in invitum* to obtain evidence of facts which courts and magistrates receive in affidavits, would seriously hinder if not entirely defeat the ends of justice. I am of opinion that whenever a person testifies, either voluntarily or under process of subpoena, to matters pertinent and material in a proceeding before a court or magistrate of competent authority, he is entitled to unqualified protection against any action for defamation by the words thus uttered.

Having thus determined the principles upon which the rights of these parties depend, we are prepared to consider whether the complaint contains enough to show that the certificate and affidavit for making which this action was brought were privileged and entitled to immunity. We are probably bound to take judicial notice of the character of the proceeding by which the plaintiff was confined. By title 3 of chap-

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ter 20, part 1st of the revised statutes, (1 R. S. 634,) as amended by the acts of 1838, 1842 and 1844, it is made the duty of the committee of a lunatic who is possessed of property, or his relatives if he have no property, to provide for his confinement if he is disordered in his senses to such an extent as to endanger his own person or property or that of others. If the committee, or the relatives, of such a person neglect to confine him, it is made the duty of the overseers of the poor of the city or town where he belongs to apply to any two justices of the peace of such town, who may, if satisfied that such person ought not to go at large, commit him to some proper place of restraint. Section 8 of the statute authorizes two justices of the city or town to issue their warrant for the apprehension and confinement of a mad person, on their own view or upon the oath and information of others without the application of the overseers. Section 22 of chapter 135 of the laws of 1842 requires the evidence of two reputable physicians, under oath, to the fact of the insanity of any person, before any magistrate or officers shall order the confinement of such person. The argument for the defendant proceeds upon the theory, first that a statement made in the course of a proceeding taken under and according to this statute as evidence to the magistrates of the lunacy of the plaintiff, was a privileged communication, and second that the alleged libels set out in the complaint sufficiently appear to have been uttered by the defendant while testifying or furnishing evidence in such a proceeding. The first proposition I am prepared to agree to. It is not, in my judgment, libelous or actionable as such, for a physician to furnish evidence, either voluntarily or under a subpoena, that another is insane, in a proceeding duly taken under any of the clauses of this statute. If the physicians in this case were parties to a conspiracy to deprive the plaintiff of his liberty, or to set on foot a malicious and groundless prosecution under the forms of law, they may be liable to an action for that. But no action of libel can be maintained for an assertion of the insanity of the plaintiff, contained in an

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affidavit made in a proceeding properly and legally instituted under this statute.

To sustain the present demurrer, however, it is necessary that it should appear distinctly by the complaint, that the occasion of uttering the alleged libel was such as I have just mentioned. The complaint must state all the facts which the defendant would be obliged to plead in setting up his privilege, in order to show that the plaintiff has no cause of action in the publication of a charge which in itself is clearly libelous. In this respect I think the defendant's counsel is mistaken in his view of the case. The complaint alleges, as has been already noticed, the publication of a paper consisting of a certificate purporting to be signed by the defendant and another person, and an affidavit signed by the defendant alone, and purporting to be sworn to before two persons who describe themselves as justices of the peace. It proceeds to state that the defendant "presented the said certificate and affidavit to the said justices of the peace," who thereupon issued a warrant, of which a copy is annexed. There is, however, no statement that these persons were justices of the peace, nor that they resided in the city or town with the plaintiff, which is necessary to give them jurisdiction to act. It does not appear how the proceeding was instituted; whether by the overseers of the poor or by two justices of the peace of their own motion. It is not stated whether the defendant voluntarily furnished the documents set out in the complaint, or whether they were made under the summons or at the request of the magistrates. One portion of the alleged libel is a certificate not under oath, and we have not been shown, nor have I been able to discover, any part of the statute requiring or authorizing such a paper. If the evidence given by the defendant was furnished voluntarily, I apprehend it was necessary for him to satisfy himself, and to show to the court, that the proceeding was regular and the magistrates had jurisdiction of the case. Where a man is called to testify, or even makes an affidavit, in a cause depending in a court of competent general or ordinary jurisdic-

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tion and proceeding according to the course of the common law, he may not be required to know or to prove that all the facts existed, or all the steps had been taken, which were necessary to confer jurisdiction in the particular case. But where a man intervenes voluntarily in a special proceeding not known to the common law, and not resulting in a judgment according to its forms, he must see that jurisdiction is acquired, and that there is in reality a proceeding in court, before he can claim the privilege of a witness for libelous charges against another. I am of opinion that the complaint in this action does not contain enough to show that the libelous publication which it sets forth was uttered in the course of a judicial proceeding duly instituted before a magistrate who had jurisdiction, and that therefore the demurrer was properly overruled, and the order appealed from should be affirmed, with costs.

[DUTCHESS GENERAL TERM, May 14, 1860. *Lott, Emott and Brown*, Justices.]

HEGEMAN, executor, &c., *appellant*, vs. SARAH M. P. FOX,
respondent.

What is to be considered the *domicil* of a person, at the time of his death, for the purpose of determining the rights of his widow in his personal estate.

There must be both the fact of abode and the intention of remaining indefinitely, to constitute a domicile.

Both must therefore be proved. The first is readily proved as a single fact; the other may be established by declarations of the party, or by his conduct.

Circumstances which were held sufficient, in this case, to show that the deceased had, at the time of his death, not only an actual residence in the state of Florida, but that he had acquired the same with the intention of remaining there an unlimited or indefinite time.

APPEAL by Joseph Hegeman, one of the executors of Austin D. Moore deceased, from a decree of the surrogate of the county of Kings, made upon a petition of the respondent,

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the widow of the testator, for a share of the testator's personal property. The surrogate decreed that she was entitled to one third of the personal property, as claimed.

B. G. Hitchings, for the appellant.

A. W. Bradford, for the respondent.

By the Court, EMOTT, J. This is an appeal from a decree of the surrogate of Kings county, adjudging that the respondent, as the widow of Austin D. Moore, was entitled to one third of all his personal property, absolutely, and notwithstanding the provisions of his will. The surrogate made this decision upon the ground that Austin D. Moore was, at the time of his death, domiciled in the state of Florida. The laws of that state were proved, and it appeared that they provide for a distribution to a widow of one third of the personal estate of which her husband should be possessed, notwithstanding any disposition of it by will. This is not disputed; nor is the rule denied that the law of the place of domicile will control the disposition and distribution of personal property, in cases both of testacy and intestacy. The question is, whether the surrogate correctly decided that Austin D. Moore had, at the time of his death, his domicile in Florida.

A domicile has been described by American authorities as residence at a particular place, with an intention of remaining there an unlimited time; and the definition is cited with approval by a learned civilian, who has published a very excellent compendium of the law upon this subject. (*See 1 Binney, 349; 16 John. 128; 8 Cranch, 253; Phill. on Domicil, 13.*) There must be both the fact of abode and the intention of remaining indefinitely, to constitute a domicile. Both must therefore be proved. The first is readily proved as a single fact; the other may be established by declarations of the party or by his conduct, which is at least as satisfactory evidence as his declarations, upon such a question.

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In the present case there can be no dispute as to the fact that Mr. Moore, at the time of his death, had an actual residence in Florida. He owned and occupied a house and plantation near Jacksonville; he had his family there with him, and he had no other dwelling house or place of abode. His farming or planting upon these Florida lands was the only business in which he was engaged, and from the time of his leaving Brooklyn, in 1855, until his death in 1857, he remained constantly in Florida, and after his purchase, upon this plantation. It only remains, therefore, to determine whether this residence was acquired *animo remanendi*, with the intention of remaining there an unlimited or indefinite time.

Mr. Moore was born in Massachusetts, and after residing successively in various places in that state, he removed to New York city and went into business. He married there, and accumulated a considerable property. Some six or seven years before he went to Florida, he left New York and went to reside in Williamsburgh. At or after this time he relinquished business, and invested his accumulations in real estate, mostly in Brooklyn and Williamsburgh, in bonds and mortgages probably upon property in the same locality, and in Williamsburgh ferry stock. He kept house with his family in a dwelling which he owned in Williamsburgh, and was no doubt domiciled in that place until he left for the south.

It is true that this domicile in Kings county, New York, continued until he had abandoned it and acquired another, in fact and in purpose. If he was not, at the time of his death, a resident of Florida, he was a resident of Williamsburgh; the question is between these two domicils. But it is not a question between two actual domicils in fact and in intention, which ought to be considered the principal. I can see no indication that the testator retained his domicile in Williamsburgh in fact or in purpose. If that still continued to be his residence, it must be because he had not, at the time of his death, acquired another residence in any definite place, and therefore his previous domicile continued, in the view of the

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law. This might be and would have been the case if he had died while traveling in search of a place where he might tarry or settle, with no place determined upon as a residence, although he had left the state of New York with a fixed intention of selecting and removing to some other abode. This, however, is not the case. The facts proved or admitted, as well as the statements and declarations of Mr. Moore, are sufficient to show that he left Williamsburgh with the intention of abandoning his residence there for a new abode in some other place. He sold his house and his furniture, he removed his family, he closed his bank account, and made such arrangements of his affairs as were natural for a person permanently leaving the place. The evidence as to his declarations and conversations, at the time of his departure and afterwards, is to some extent conflicting upon the question of his intention, although I think the weight of it is that he neither expected nor intended to return to the northern states. In any view of the testimony it is material to observe that he expressed no desire or intention to return to Williamsburgh. He spoke of returning from the south to reside in New York, or on the banks of the Hudson river, but I do not perceive any proof that he looked forward, under any circumstances, to resuming his residence in Williamsburgh.

The question then is whether he acquired a residence in Florida, or whether he continued a mere traveler, with no intention of becoming domiciled any where, after he left this state, and therefore continued to hold a legal domicile here. The proofs are, we think, sufficient and satisfactory upon this point. I refer to the proof of his acts, rather than to his written or spoken declarations. To the evidence of what he said, at various times, I attach little importance. It comes to us impressed with the character of the particular mood of the man when he uttered it, which no doubt varied and was affected by the condition of his health, by his family circumstances, and by other causes. It is colored more or less by the medium through which it comes, and it depends altogether

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upon the recollection of witnesses. Nor do I consider the statement in Mr. Moore's bill in chancery, that he was an inhabitant of Florida, standing alone, as at all decisive. It was necessary for him to make such an allegation for the purpose of his suit, and he might very well have made it without fully considering its import or its extent, or its consequences in other relations. Coupled, however, with his conduct, it is evidence which may disclose another motive for a wish on his part to acquire a residence in Florida, at or after the time when he settled near Jacksonville. It may have been not merely the desire of permanent occupation, the attractions of the climate, and the hope of restored health which led him to settle as a planter. He may also have been disposed to avail himself of the laws of Florida upon the subject of divorce, to terminate his domestic troubles. When the suit which he commenced for that purpose did not seem likely to accomplish what he desired, he expressed a purpose to return to New York, that the laws of that state might govern the distribution of his property at his death. He must have had in mind the very contingency which has now occurred, and which, under the laws of Florida, he was unable to prevent. His remark can hardly have had reference to the disposition of his real estate in Florida only, for a sale and conversion of that would have accomplished as much as his leaving the state, if he were not a resident of the state and subject to its law as to his property. These statements and his conduct give color to each other, and lead strongly to the conclusion that his residence in Florida was both understood and intended by himself to be permanent, and that he was not at all times influenced in the matter by considerations connected with his health.

I consider Mr. Moore, as I have already said, to have formed and manifested a purpose of abandoning his New York domicile, when he sailed for the south. I find in his subsequent acts satisfactory evidence that having abandoned his former domicile he determined not to live as a sojourner or a

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wanderer, but to settle and acquire a new abode on a Florida plantation. In January or February, 1856, after having spent some time as a guest in a hotel, pleased with the country, the people and the climate, and desirous for family as well as other reasons to have a home, he purchased a somewhat extensive plantation. He proceeded to stock the plantation and to furnish the house. He entered into the business of planting and the various occupations connected with fitting up his place, with energy and satisfaction. He sent for his brother with his family, to oversee the plantation, prepared to send for his daughters from the north, where he had originally intended to leave them for the purpose of education, and endeavored to provide for their instruction by a governess, in Florida. He went to housekeeping, and lived in every respect as did other residents, so far as his domestic affairs did not interfere with him. His troubles with his wife broke in upon his plans. They led him, no doubt, to have the deed of his property originally taken by another person, and they induced a purpose, or the expression of an intention, of returning to New York. This has been already alluded to in another connection. It is sufficient here to say that if that purpose was not effected, it cannot alter the law or the fact as to his domicile in Florida, if such existed at the time.

Against all the acts, declarations and motives which have been thus briefly alluded to, there are no facts to be set, except the estate in real and personal property which the testator retained in Kings county, and his previous domicile there; and this I find every evidence of his design to abandon at any rate. These facts, considered in themselves, appear to me clearly insufficient to countervail the preponderance of evidence in favor of the Florida domicile.

But it is said that all the acts and manifestations of purpose which are proved in the case are deprived of their effect, and that whatever the testator did, could not legally produce a change of his domicile, because these acts were done under the stress of impaired health, and the change which he made

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was compelled by that reason. It may be conceded that Mr. Moore broke up his establishment in Williamsburgh in consequence of his enfeebled health, and went south in order to its restoration, or rather to the prolongation of his life in a milder climate, and that if it had not been for this, he would never have left this state. It is said that absence from an established domicil will not effect its loss, if such absence be compulsory; and that it is compulsory if occasioned by ill health. The case of the invalid is likened to that of the exile, the soldier or the ambassador. To a certain extent these propositions are undeniably true. Mere absence, when compelled by the urgency of sickness that will admit of no delay to avert an immediately fatal termination, cannot take away a man's residence in the home which he leaves, or fix it in the place to which he goes. A man who flies from the rapid approach of death has no other motive, and does not exercise the choice which is necessary in a change of his home and permanent abode. But the whole matter is a question of intention, and no arbitrary rule is to be laid down in relation to it. None of the cases cited from the English courts will be found to assert any such rule. In most of these cases the question has arisen where an Englishman has gone to a foreign country, to Madeira or Portugal or the south of Europe, to recover health or because the climate at home was too severe. In *Stanley v. Bernes*, (3 *Hagg.* 373,) Sir John Nicholl inclined to the opinion that a British subject could not acquire a foreign domicil by any residence abroad occasioned by ill health, and unaccompanied by an attempt to cast off his national character. But the court of delegates reversed his decision, and held that an Englishman may become domiciled abroad without ceasing to be an English subject. But the fact and the rule as to the facility with which a domicil may be changed, or the evidence necessary to prove an intention to change it, from one state of this confederacy to another, must obviously be different from that which is to be looked for in order to establish a determination to leave one's native country for another and a foreign

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country. The cases are not analogous in a very striking and essential point. In the case of *Johnstone v. Beattie*, in the house of lords, (10 *Cl. & Fin.* 43,) which was cited on the argument, the point determined was that the English court of chancery had power to appoint guardians for an infant who was residing in England, notwithstanding her domicile was in Scotland. The observations of Ld. Campbell, in his dissenting opinion, are upon the facts in that case, where it appeared that the family mansion was in Scotland, and there also was the property of the infant and her mother; so that he expressed the assurance that the daughter would return to the mansion of her ancestors. There is little in the present case which can be said to be parallel to these facts. The case of *Hoskins v. Matthews*, (35 *Eng. Law and Eq. Rep.* 532,) resembles the present case much more nearly. The decedent there was held to have acquired a Tuscan domicile, a domicile, be it observed, in a foreign country, by residence, the purchase of a villa, and the establishment of his family there, making it, in the language of the very able opinion of Lord Justice Turner, the place from which he went forth, to which he returned, and in which he expected to die. This domicile was recognized by the court, notwithstanding that the decedent's property and papers were left in England, his bank account continued there, his attachment for England was strong and his desire to return thither often expressed. He did not mingle in Italian society, took no part in public affairs, carefully preserved his foreign character, and held in avowed detestation the priesthood and religion of the country where he was living. Certainly the present is a stronger and more favorable case for the acquisition of a new domicile than that. But a more material feature of that case, in respect to the present controversy, is that Mr. Mathews was induced, or as we might say compelled, to leave England by the attacks of a disease which he hoped to mitigate or to cure by a residence in another climate. He was obliged by his health to live in another country than that of his birth. The judge observes that it was the staple of the argument before him

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against the change of domicile, that domicile could not be founded upon such a compulsory residence, and that is the reasoning here. But he does not recognize the rule contended for, and his observations, which appear to us to be exceedingly judicious and sensible, cannot, we think, be cited in favor of the present appellant. We understand the degree of compulsion to be, in effect, the same in that case as in the one before us. Mr. Moore, when he left New York, was not in any immediate danger, any more than Mr. Matthews when he left England: or at least, which is the material point, he did not suppose he was. He was not like a man fleeing a pestilence or an attack of disease threatening instant death, and therefore leaving no space for choice, and no motive but necessity. It is going altogether too far, and much farther than Sir George Turner felt willing to go in the case referred to, to say that ill health, the necessity of finding a milder or a better climate, to live comfortably or to live at all, is not to be admitted as a motive for a change of residence. Such circumstances may create a sort of necessity, but it is a moral necessity, acting upon the will. And whenever there is an act of volition, a determination to abandon the old home and make a new one, it is not material what motives have induced the choice. Undoubtedly there may be cases, as Sir George Turner observes, in which even a permanent residence in a foreign country, occasioned by the state of the health, may not operate a change of the domicile. But in these questions every case must stand upon its own circumstances. The cases in which the residence of an invalid in a foreign country, or even in a distant portion of his own country, will not create a domicile, may be understood by comparing them with the case of the exile, or as the text writers denominate him, the emigrant, which they more nearly resemble. The fugitive from revolution or civil war comes to his new abode with no intention of abandoning his country, or of permanently remaining abroad. He is coerced by causes which approach to, if they do not constitute, actual physical compulsion, and his manifest purpose is only to remain in his new

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abode as long as these causes operate, and when the necessity for absence is removed, to return. There may be cases of instant fear of death by sickness, which resemble this, but where a man deliberately breaks up his residence, purchases a new mansion, engages in new occupations, and acts in every respect as a man would who was settling himself altogether from choice and free will, he must be acting under the control of motives and not of necessity, and he looks forward to no return. He goes to another region to obtain that health which he is convinced he cannot enjoy where he is, and he is much more like the man who changes his abode in quest of fortune, that he may gain a living, or a competence which he sees he cannot get at his present home. If there be satisfactory evidence in this case, as we all think there is, of Mr. Moore's intention to break up his residence in Kings county, and subsequently to make Florida his home, we think the force of this evidence is not destroyed by the fact that he was driven to the step by what he considered the necessity of preserving his health or his life. We might as well hesitate to say that he lost his domicil of origin when he removed from Massachusetts to New York, doubtless under the belief that he must do so in order to earn the fortune which he sought, or perhaps the very means of living. We agree therefore with the conclusion of the surrogate that Mr. Moore was, at the time of his death, domiciled in the state of Florida.

There was one exception taken in the course of the hearing in the surrogate's court which was strongly pressed upon our notice. In the progress of the trial it was deemed important to introduce portions of the correspondence of Mr. Moore, in order to show his motives and intentions. A Mr. Field, to whom a number of these letters had been addressed, was called as a witness by the respondent, and proved certain letters, portions of which were read and the residue suppressed on his statement that it was confidential between him and the testator, and immaterial to the cause. This was done without objection by any party. Subsequently the same witness was

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served with a subpoena on the part of the present appellant, to produce all the correspondence. On his examination under this subpoena he admitted its service upon him, and stated that he had not brought the letters. He was questioned somewhat as to their character, and when he alleged that they were immaterial to the case, and that their contents were private and confidential, the appellant endeavored to ask him the import of that part which he stated to be of a confidential character, but his question was overruled. We see no just ground of exception to the exclusion of these questions. The inquiry was not material to the merits; it was addressed to the discretion of the surrogate if it were to be heard at all, and he should have had the documents themselves before him to decide it. If the contents of the letters were material to the issue in the cause they could not be proved in that way. The counsel for the executors then asked the surrogate for an order compelling the production of the letters, which was refused, and the counsel excepted. The letters were not in court, and the only order which the surrogate could have made, so far as we can perceive, would have been an order for an attachment, or a commitment of the witness for a contempt, in not producing what the subpoena commanded. If an adjournment had been applied for, in order to reach the papers by such proceedings, that would have been an application to the discretion of the surrogate which we could not review. The application which was made, or the ruling upon it, was still less a subject of exception. Besides being addressed to the discretion of the court, it was a matter between the party and his own witness, and not between party and party. We could not reverse a decree to which the respondent is in our opinion justly entitled upon the merits, because a contumacious witness of her adversary refused to obey the process of the court, or to furnish the evidence which it demanded, or because the surrogate, it may be improperly, refused to punish him for his refusal. The respondent is not answerable for the conduct of the appellant's witness, nor for any error committed by the court in

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dealing with him. Whatever hardship may have been inflicted upon the respondent by the course of this witness, we are all of opinion that there is nothing presented by this part of the case which would justify our interfering with the decree.

The decree of the surrogate is affirmed.

[DUTCHESS GENERAL TERM, May 14, 1860. *Lott, Emott and Brown*, Justices.]

ANNA LUDLAM vs. MAXIMO M. LUDLAM and others.

The statutes of the English parliament, relative to the children of British subjects, born abroad, were in force in the province of New York down to the time of the American revolution, and were continued by the constitution of the state of New York, adopted in 1777. But in 1778 it was enacted that after the first day of May then next, none of the statutes of Great Britain should be considered laws of this state. The effect of this, and of the subsequent legislation of congress upon the subject of naturalization, has been to leave the condition of all the children of American citizens born abroad between the years 1802 and 1855 exclusively to the decision of the dormant principles of the common law.

By the common law, when a subject is traveling or sojourning abroad, either on the public business, or on lawful occasion of his own, with the express or implied license and sanction of the sovereign and with the intention of returning, as he continues under the protection of the sovereign power, so he retains the privileges and continues under the obligations, of his allegiance, and his children, though born in a foreign country, are not born under foreign allegiance, and are an exception to the rule which makes the place of birth the test of citizenship.

The universal maxim of the common law being *partus sequitur patrem*, it is sufficient for the application of this doctrine that the father should be a subject, lawfully and without breach of his allegiance beyond sea, no matter what may be the condition of the mother.

The children of subjects thus sojourning or traveling beyond the seas were recognized as denizens, under English law, when and as fast as the occasion and instances of foreign travel and temporary residence multiplied, and the question was presented to the courts; and this was by the development and application of the doctrines of the common law, and not by mere force of statutes.

The statute of Edward 3, *De natis ultra mare*, was not intended to abrogate,

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nor is it to be understood as abrogating, an existing rule of law and introducing a new rule by the will of the legislature, but was declaratory in its nature; or at least, furnishes no evidence that the rule of the common law was other than that contained in its provisions, but rather the contrary.

In accordance with the above principles, *Held* that the defendant, the son of an American citizen by an alien mother, born in a foreign country while his father was temporarily resident there, was a citizen of the United States, and entitled to inherit here. LOTT, J. dissented.

Held also, that the greater or less duration of the father's residence abroad was not material; so long as it was, in intention and in fact, temporary, and not perpetual.

APPPEAL by the defendant Maximo M. Ludlam, from a judgment entered at a special term, after a trial at the circuit, before Justice LOTT, without a jury.

C. J. De Witt, for the appellant.

B. C. Underhill, for the plaintiff.

EMOTT, J. The plaintiff brought this action against Silas and Edward Ludlam and William H. Hewitt, who are the executors of her father, Richard L. Ludlam, and against Maximo Ludlam, who is her only surviving brother, to compel the former to account for and pay over to her, to the exclusion of the latter, all the proceeds of the sale of certain lands in the county of Queens and the city of New York. These lands were owned by Thomas R. Ludlam, a brother of Richard R. Ludlam, the plaintiff's father. Richard R. Ludlam died in 1838, and Thomas R. Ludlam died in 1847, intestate, and thus the children of Richard R. Ludlam were among the heirs at law of the latter, and one-sixth of his lands descended to them as representing their father. The defendant Silas Ludlam was appointed by this court the special guardian of both the plaintiff and the defendant Maximo M. Ludlam, for the purpose of joining in a sale of these lands, and one-sixth of the proceeds was paid over to the executors of Richard L. Ludlam, who are the testamentary guardians of both his children. These children have now both attained lawful age, and the plaintiff claims the whole of the

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proceeds which were thus received by the executors of her father, to the exclusion of her brother Maximo M. Ludlam, on the ground that he was an alien at the time of the descent, and therefore could not inherit to his uncle. The judge before whom the cause was tried decided that Maximo M. Ludlam was an alien in 1847, when the descent was cast by his uncle's death, and therefore the plaintiff was entitled to the whole proceeds of the lands in question; and this is the only question in the case.

Richard L. Ludlam, the father of these parties, was a citizen of this country, born here in 1804. In 1822 he went to Peru to seek employment, and better his condition. He became a clerk in a mercantile house in Lima, and in 1828 married a woman who was a native of Chili, but then a resident of Peru. Maximo M. Ludlam is her son, and was born in Lima in 1831. In 1828 Richard L. Ludlam went into business on his own account, in Lima, and continued to reside there until April, 1837, when he left South America and came back to reside in this country with his wife and children. They had other children born in Peru besides Maximo, but they subsequently died, in this country.

The plaintiff was born after their arrival in New York, in December, 1837. The mother of the plaintiff was examined as a witness on the trial of this cause, and testified to the facts just stated, and also that they left Lima because her husband was sick, and was advised to leave that country, and because he wished to educate his children here. She also stated that after the birth of their children in Peru, he always intended to return to this country, and expressed that intention. Silas Ludlam was also sworn at the trial, but his testimony, except the proof of some undisputed facts, was chiefly of a negative character; that communication between this country and Peru was at that time very infrequent if not difficult; that but little correspondence took place between his brother and the family at home, and that they were not aware of any purpose on his part to return, until he reached the United

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States with his family. It may be added that the wife of Richard Ludlam has never been naturalized in this country.

Upon this evidence the judge found that Richard L. Ludlam in 1822 voluntarily expatriated himself from the United States for the purpose of becoming a permanent resident of Lima, in Peru, and of establishing his permanent domicile there, and in a few months thereafter did become such permanent resident, and establish his permanent domicile in Lima. If the word "*expatriated*" is to be understood here in its proper sense, I should be unable to agree to this part of the decision, as a question of fact. To expatriate is to leave one's country, and renounce allegiance to it, with the purpose of making a home and becoming a citizen in another country. It includes more than a change of domicile, and it is hardly an accurate use of terms to say that a man has expatriated himself with the design of changing his residence. He might more correctly be said in a given case to change his domicile with a view to expatriation. But I do not discover, in the evidence in this case, any thing to show that Richard Ludlam ever intended to expatriate himself, to renounce his American citizenship and assume allegiance to a foreign power, while it will be observed that he is not found or decided to have actually done so. He neither became, nor declared any intention of becoming a Peruvian citizen, nor did he in any way deny or renounce his American citizenship. He left his native country in the search of employment and fortune. He found employment and at length established himself in business. He married and had children, and after that he looked forward constantly to a return to the United States. So at least I read the evidence. There is no doubt that he acquired a domicile in Lima; that he went there and remained there, with no fixed purpose of a return at any definite time. That was his residence until he was probably driven away by the failure of his health. Still that he was an American citizen and an alien in Peru, although resident there as a merchant and for the purpose of trade, and that when he returned to this country he was as completely vested

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presented questions involving the right of expatriation and change of allegiance, and so widely distinguishable from the present. In *Lynch v. Clarke*, (1 *Sand. Ch. R.* 659,) Vice Chancellor Sandford expresses the conviction that the children of our citizens born abroad were citizens by force of the common law, under which he supposes that children born abroad of English parents were subjects of the crown and not aliens. In his opinion will be found a reference to all the American decisions, in none of which, however, is the point distinctly passed upon.

In England, while the right to citizenship of children born under such circumstances has been constantly asserted, it has never been expressly decided whether that right was due to the common law or to positive statutes. As early as it became a frequent or a familiar thing for Englishmen to leave the kingdom with their families, either for purposes of travel or trade, we find parliamentary action to remove all difficulty or doubt in the case of children who might be born to them abroad. The earliest parliamentary act is what is known as the statute *de natis ultra mare*, passed in the 25th year of the reign of Edward 3d, A. D. 1351. The existence of this early statute has unquestionably prevented a clear exposition by subsequent judges of the principles of the common law upon this question. But it is material to ascertain whether the "*statutum de natis ultra mare*," like an ordinary statute of the present day, introduced into the law a new rule, or whether it was rather a declaration of the opinion of the parliament upon the law as it then was, more nearly analogous to what in modern times is called a declaratory act. It will be seen that this is a question of no small importance in the disposition of the present case, in consequence of the peculiar condition of American legislation upon the subject.

The reign of Edward 3d is one of the most important eras in English history, on many accounts. It was attended with some special circumstances which may have given occasion to questions like the present. It was the period of the com-

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mencement of the French wars which led to the removal and settlement of many English subjects in places in France, which by the changes of war and of treaty were at times under English and at others under French domination. At the same time the English nation was assuming a more influential position among European powers, and the intercourse among all nations was growing more frequent. Instances of leaving the kingdom for the purpose of commercial, military or public intercourse with other nations, must have been becoming more common, and questions as to the rights and privileges of children born abroad to subjects thus absent from the realm, were more likely to be agitated. It may also be noted that Philippa, the queen of Edward 3d, was by birth an alien to the realm, and that a large portion of the life of Edward the black prince was spent abroad. His son, who afterwards came to the throne as Richard 2d, was known, from the place of his birth, as Richard of Bordeaux.

When we find that parliament interposed to settle a question which had arisen or might arise out of such circumstances as have been alluded to, we are not to presume, as we might in considering a statute of the present day, that they intended or were understood to make the law, and to introduce a new rule. The constitution of the English legislature at that day is to some extent a matter of dispute, and its functions, or the manner and extent of their exercise as to legislation, was certainly much more limited than they afterwards became. The organization and manner of session of the commons as a separate or constituent part of the legislature was as yet ill defined. There is no record of a speaker of the house being chosen, until at least as late as the fiftieth year of Edward 3d, and probably still later. The parliament was first and usually called together to grant taxes, and out of the demand for these, and the power to impose conditions upon granting them, grew much of its authority. The commons asserted the right to petition for the redress of grievances, and their petition, formally assented to by the king and the coun-

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cil, was in many cases the form of parliamentary action. Thus the statute of treasons, passed in the same year with the law we are considering, and which is to this day one of the fundamental statutes in English criminal law, is founded upon the petition of the commons. The commons pray that "whereas the king's justices adjudge persons to be traitors for various matters not known to be treason, it would please the king by his council and the great and wise men, to declare what shall be treasons in this present parliament." The answer to this petition contains the existing statute. It was considered no light matter to make a statute which should introduce a new rule of general law, to be forever incorporated with the law of England. Mr. Hallam says that it was a common answer to the petitions of the commons, that they could not be granted without making a new law. And this reluctance led to the distinction between statutes, which were perpetual, and ordinances, which were temporary in their nature. It seems also that the assembly of the different estates of the realm was not looked upon merely as such a body as it came to be afterwards, acting only by and through the forms of legislation. It was also a high court in which injustice was to be punished, and grievances redressed, sometimes upon the complaints of individual suitors, but in many, probably in most instances, upon the petitions and complaints of the representatives of the commons of England in behalf of their whole body. The ordinary courts of justice were neither sufficiently strong to protect the weak against the powerful, nor sufficiently known and respected to make their decisions, as yet, the authoritative expositions of the law which they afterwards grew to be. In the reign of Edward 2d, it was ordained that the king should hold a parliament once, and if necessary twice, every year, that the pleas which have been delayed, and those wherein the justices have differed, may be brought to a close. And thus in the present statute it appears that the question which it was passed to settle, and which was a question as to what the law was, had been before parliament in a previous

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year of the same reign. I am not aware that legal historians or antiquaries have considered the exercise of such quasi judicial powers as these by the parliament, to have been confined to the council, or to have been analogous to the present appellate jurisdiction of the house of lords, however on the subsequent growth of the constitution it may have terminated in an appellate jurisdiction confined to that body exclusively.

The statute *de natis ultra mare* begins by reciting that "because some people be in doubt if the children born in the parts beyond the sea out of the ligeance of England, should be able to demand any inheritance within the same ligeance or not, whereof a petition was put in the parliament late holden at Westminster the 19th year of this reign, &c., and was not at the time wholly assented, our lord the king willing that all doubts and ambiguities should be put away, and the law in this case declared and put in a certainty, hath charged the prelates, earls, barons and other wise men of his council assembled in this parliament to deliberate on this point." It then declares that these, all of one accord have said that it is and always has been the law of the crown that the children of the king, wherever they may have been born, may inherit. After this, the statute proceeds to declare certain persons to be denizens, who are named, and who we may presume were all the persons concerning whose denizenship a question had been brought to the notice of the parliament. Then follows the part of the statute to which the present question refers, which is to the effect that the barons, &c., and the commons assembled, "be of one mind accorded that all the children inheritors which from henceforth shall be born without the ligeance of the king, whose fathers and mothers at the time of their birth be at the faith and ligeance of the king of England, shall have and enjoy their inheritances, &c. So always that the mothers of such children do pass the sea by the license and wills of their husbands." It will be observed that the natural import of this language is that both the parents must be subjects, to make the issue inheritable. It was not until

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far more recent times that any express statutory sanction was given to a more lenient rule, for it was not until the statutes of 7 Anne, 10 Anne, 4 George 2, and 13 George 3, that any act of parliament declared that the child of an Englishman, born abroad, should inherit, although the mother was an alien. There is another statute, passed in the 42d year of the reign of Edward 3, which may be cited as to some extent explanatory of that which we are considering. The act of the 42d Edward 3, is to this effect: on the petition "that children born beyond sea in the seignories of Calais, Guienne and Gascony, and elsewhere in the lands and seignories that belong to our lord the king beyond sea, should be inheritable," &c., "it is agreed and assented that the common law and the statute on this point should be kept and observed." The meaning obviously is to assert their denizenship, and this is referred not wholly to statute, but to both common law and statute. The act of 25 Edward 3 is expressly declaratory as to the children of the king, and this has been used as an argument, as for instance by Barrington in his comment, (*Obs. on Stat.* 209,) that in the case of a common subject the law was apprehended to be otherwise. There is, of course, a certain degree of force in the argument, but I think it is counterbalanced by the whole form and language of the act, and by the reasoning of the subsequent decisions, as well as by the course of legislation. The statute recites that the question as to the children of subjects born under such circumstances had been discussed but not decided, and was in doubt. The law was therefore not against their denizenship, and we may decide the question upon principles, and may call to our assistance, to ascertain these principles, the subsequent as well as prior cases in the courts.

The year books, which contain the earliest reported cases in the English courts, begin with the reign of Edward the 2d, and there is nothing before that, except a few scattering cases in the time of Henry the 3d and Edward the 1st, which are found in *Fitzherbert's Abridgment*.

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The earliest case in which a question like the present occurs, is given in *Brooke's Abr., Denizen*, 6. The writer says, "Nota per Hussey, Ch. J.: If a man be born beyond sea, whose father and mother are English, he should be inheritable before the statute, but the statute makes this clear." The date given for this is the first year of the reign of Richard 3d. The same *Brooke's Abr.*, in the same title, § 21, says: "If an Englishman pass the sea and marry an alien woman, by this the wife is of the king's allegiance, and the issue will inherit," for which the author refers to the *Abridgment of Assizes*. In *Collingwood v. Pace* (1 Ventr. 422) Lord Hale asserts the converse of this proposition, that if an English woman go beyond sea and marry an alien, the children are aliens, for the wife was *sub potestate viri*. In the first of these statements from *Brooke's Abridgment*, the proposition given is cited as laid down by the court to the same effect as declared by the statute. The second goes farther than the letter of the statute, and depends upon the settled maxim of the common law, and of all free states where that law prevails, that the offspring follow the condition of the father and not the mother, *partus sequitur patrem*. In *Rex v. Eaton* (*Littleton's Rep.* 23, 26, 27) will be found a full and well reasoned discussion of this subject in the argument and decision of the case. It was insisted there that allegiance was not merely local; that an alien was one born not only out of the kingdom, but under a foreign obedience. Cases were put and cited and distinguished of a man traveling, which, says the report, the common law did not forbid, and going out of the realm into the dominions of an alien friend or into those of an alien enemy, and with or without the king's consent, and of his children born either while such consent continued, or after it was revoked and he recalled. The maxim *partus sequitur patrem* was cited, and its application to cases arising under villenage noticed. The case in hand was of an English merchant who had gone into Poland and married a woman there; and the question was whether their child was an alien.

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It was held that he was not, for which Yelverton, J. gave for reason that the father was a merchant and went abroad by license, and the son took the father's condition. Some of the other judges put the case upon the statute of Edward 3d, and held that the words "whose father and mother" in that statute should be read "father or mother." I confess this seems to me much more doubtful law than the other doctrine. The construction is a violent one, and the doctrine of the case is more easily sustained upon the principles of the common law, and as if they had been declared by the statute. If the statute had not been passed, the common law, as foreign travel and commercial pursuits increased, would have asserted the rule which the statute declared, but declared in respect only to children whose fathers and mothers both were English. The common law, adhering also to the doctrine that the condition of the father determined that of the offspring, would reach cases which were not within the letter of the act. This case in Littleton was decided in 2 Charles 1st. A case is cited there which will be found in *Cro. Eliz.* 3, that when baron and feme English go beyond sea without license, or tarry there after the time limited by the license, the issue is an alien and not inheritable. *Bacon v. Bacon* (*Cro. Chas.* 601) is very similar to the case cited from Littleton. Thomas Bacon went abroad to carry on trade, and married the daughter of another English merchant, resident abroad. Their child, born abroad, was held to be a denizen. Brampton, Berkley and Croke said that the father being a merchant and residing abroad for purposes of trade, his child should be a denizen, and that even though the mother had been an alien, for the children follow the father's condition. Brampton said this was by the common law; but Berkley by the statute of Edward 3d; and Croke seems rather to have held with Brampton. The case reported in Littleton was cited. The case of *Collingwood v. Pays* or *Pace* is also reported in 1 *Siderf.* 193. The point decided in the exchequer chamber in this case was that when an alien had children denizens, they could

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inherit to one another. The reporter notes what was said, apparently in argument, about the statute of Edward 3d, that although this names husband and wife, still it suffices that the husband should be a subject though the wife was an alien, for the wife was under the power of the husband, and so under the same allegiance as he. A rule, it may be observed, which does not make allegiance altogether a question of place. He proceeds that it is not sufficient where the wife only is a subject; and he refers to the cases in Littleton and Croke, as deciding that the children will inherit as before if the father be a subject, though the mother be an alien. Then the report proceeds to give the rule that the children will not inherit, although both parents are subjects, if they are born abroad after the license to the parents to remain abroad is determined, which again does not go upon the ground of a merely *local* allegiance. Finally, the reporter adds "quere of persons not merchants who go beyond sea without license, and have children, if their children inherit." A question which was not to be solved by the letter of the statutes, which said nothing either of such merchants or of license by the king to leave the realm. These principles will be found collected in *Com. Dig. Alien B*, but no opinion is expressed by the author whether the statute of Edward 3d was declaratory of the common law or first established the rule. In *Bac. Abr. Alien A*, the rule is given that if an English merchant go beyond sea and take an alien wife, the issue shall inherit him. In *Calvin's case*, or the case of the post nati, (7 Co. R. 1; 2 *State Trials*, 560,) the subject of allegiance was very largely considered. The question upon which that case turned was whether a man born in Scotland after the accession of James to the crown of England was an alien or a denizen. It was determined in favor of his denization; and although from the existence of the statute of Edward 3d, which seemed to reach nearly all cases of possible inconvenience, and the comparative infrequency of journeys or residence abroad, the principles of the common law were not disarmed in their application to instances of children of Eng-

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lishmen resident in foreign countries for trade &c., yet the doctrine of the nature and essence of allegiance was thoroughly discussed, and some cases considered which must go upon the principles asserted by some of the judges in *Bacon v. Bacon* and *Rex v. Eaton*. Thus the case of an ambassador was put, and it was agreed that his children would be denizens though born abroad. When foreign travel became more frequent it would have been seen and no doubt declared that absence for trade or travel was as lawful as if it were upon the king's business. It is true that the doctrine of allegiance, as consequent or dependent upon the place of birth, was always strongly insisted upon by English courts and lawyers in favor of the English crown, and a right to the allegiance of every person born within the realm was sometimes asserted, no matter how he came to live there, or who were his parents. But the bearing or limitation of this doctrine in international law was never considered, and I think it is plain, from what has been cited, that the converse proposition was never conceded, that the place of birth would make the children of an English subject free from his allegiance. This depended upon the circumstances and the condition of his absence. It will be found that the doctrine of allegiance from the mere place of birth has met with very various treatment in the tribunals of every country, according to the aspect in which it has been presented. It has been strenuously insisted upon when by birth the person in question would be bound to the country of the tribunal, while no country has ever been as ready to assert it when it would work against itself. It can hardly be said to be settled as a universal rule; certainly not without exceptions. I cannot doubt that the principles of the common law would protect the children of British subjects born abroad during a temporary absence of the parents, and assert their denizenship and allegiance to the British crown. The statutes which were passed, from time to time, rendered the elucidation and application of these principles in most cases unnecessary. Jenkins, in his *Centuries*, page 3, case 2, says expressly, that

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the children of a merchant trading in a foreign country, by an alien mother and born there, shall be heirs to the father, for the business of a merchant requires a long abode abroad if he will not trust his fortune to factors; and this he seems to put not upon the statute but the principles of the common law. There are one or two more recent cases which require notice. One of these is *Doe dem. Durroure v. Jones*, (4 T. R. 300, 308.) The point there ruled was that the son of an alien father and an English mother, born out of the king's dominion, could not inherit either at common law or under the statutes. This is a very different case from the one in hand, by all the effect of the application of the rule *partus sequitur patrem*. In reading the opinion of the judges in this case the observation which has been already made, that the existence of the various and successive acts of parliament on this subject presented a clear and direct decision of the point by the common law alone in any of the earlier cases, should not be forgotten. Lord Kenyon observes, in his opinion, that the character of a natural born subject, anterior to the statute, was incident to birth within the allegiance of the king only. This remark, in its bearing upon the present question, should be qualified by the addition that as travel and foreign residence became more frequent and necessary, a temporary abode in a foreign country was regarded by the law as not being a departure from the allegiance of the sovereign, or as constituting an exception to the rule. The other judges evidently sanctioned the doctrine that the denizenship of the son of an English merchant by an alien mother must be referred to the condition of the father, and his lawful and temporary abode in a foreign country, and not to a violent construction of the statute of Edward 3d, changing "and" into "or." The case of *Doe dem. Thomas v. Acklam* (2 Barn. & Cress. 779) does not distinguish between the effect of the statute and the common law. It contains, however, a valuable discussion of the subject in the argument at the bar by Tindall & Parks, who were of counsel. Singularly enough, their arguments are cited by

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the late Vice Chancellor Sandford, in *Lynch v. Clarke*, (1 *Sandf. Ch. Rep.* 659, 678,) as if they were opinions delivered from the bench to which both these distinguished counsel were afterwards elevated. Sir Charles Abbott, afterwards Lord Tenterden, was then chief justice, and delivered the only opinion in the case.

Sir William Blackstone, in his commentaries, intimates the opinion that at common law a man born out of the realm, of whatever parents, was an alien. He seems to consider the exceptions which must, he admits, be made to this rule, as resulting from the statutes. The distinguished commentator, like the English judges, was not driven to decide the question, as we are, without the aid of statutes. If he had been I am confident he would have arrived at a different conclusion. Reeve, in his *History of English Law*, (vol. 2, p. 400,) says that the statute of Edward 3d was made to remove some doubt which was entertained about the denization of children born of English parents out of the kingdom; and Chancellor Kent seems to have entertained the same opinion. (2 *Kent's Com.* 49.)

The statutes of the English parliament, to which I have referred, were in force in the province of New York down to the revolution, and were continued by the constitution of the state of New York, adopted in 1777. But in 1788 (2 *Greenl. Laws N. Y.* 116) it was enacted that after the 1st of May next, none of the statutes of Great Britain should be considered laws of this state. The effect of this, and of the subsequent legislation of congress upon the subject of naturalization, has been to leave the condition of all the children of American citizens born abroad, between 1802 and 1855, exclusively to the decision of what Chancellor Kent. (2 *Kent's Com.* 53,) calls the dormant and doubtful principles of the common law.

Dormant these principles certainly have been during the long period, in which the need of them has been supplied by statutory regulations, but I think they are not altogether doubtful.

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I conceive that 1st. By the common law when a subject is traveling or sojourning abroad, either on the public business, or on lawful occasion of his own, with the express or implied license and sanction of the sovereign, and with the intention of returning, as he continues under the protection of the sovereign power, so he retains the privileges and continues under the obligations of his allegiance, and his children, though born in a foreign country, are not born under foreign allegiance, and are an exception to the rule which makes the place of birth the test of citizenship. 2d. That as the universal maxim of the common law is *partus sequitur patrem*, it is sufficient for the application of the doctrine just stated, that the father should be a subject, lawfully and without breach of his allegiance beyond sea, no matter what may be the condition of the mother. 3d. That the children of subjects thus sojourning or traveling beyond the seas were recognized as denizens under English law, when and as fast as the occasion and instances of foreign travel and temporary residence multiplied, and the question was presented to the courts, and this was by the development and application of the doctrines of the common law, and not by mere force of statutes. 4th. That the statute of Edward 3 was not intended, nor is it to be understood as abrogating an existing rule of law, and introducing a new rule by the will of the legislature, but was declaratory in its nature, or at least furnishes no evidence that the rule of the common law was other than that contained in its provisions, but rather the contrary. The denization of the children of a British father by a foreign mother, before the statute of Anne, must be attributed to the common law, rather than to a strained construction of the statute of Edward, and is an important indication of the origin of the whole doctrine on this subject.

It may be objected that the country in which such children are born, might claim them as citizens by reason of their birth. I apprehend not, when the residence of the parents was merely temporary, and when the children were removed before their

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majority. Cases might perhaps be supposed when the children would be to some extent under both allegiances, or at least might be entitled or bound to elect between the two. But when, as in this case, the parent returns to his native country, which he had never abjured, nor permanently forsaken, bringing the child while still an infant, that country cannot be called upon to relinquish his allegiance, or that of his children, on account of any possible conflict with the country of his temporary abode.

As I have already said, the greater or less duration of that abode does not seem material, so long as it is, in intention and in fact, temporary and not perpetual. I can discover no rule which would denationalize this defendant, which would not be equally operative if his father's residence in Peru had been but for one year or two, provided it had been an actual and legal domicil.

Although a domicil, it was that of a merchant temporarily resident abroad, intending at some future time, although at a time not defined, to return to the United States, not expatriated, and who had never ceased to be a citizen of his native country. Under these circumstances I think his son, though born in Lima, is a citizen of the United States, and entitled to inherit here. My conclusion therefore is that the judge before whom this cause was tried erroneously held to the contrary, and that his judgment must be reversed, and a new trial ordered.

BROWN, J. concurred.

LOTT, J. dissented.

New trial granted.

[DUTCHESS GENERAL TERM, May 14, 1860. *Lott, Emott and Brown*, Justices.]

ONDERDONK vs. THE CITY OF BROOKLYN.

A purchaser of lands sold for taxes or assessments, in the city of Brooklyn, cannot maintain an action against the city, to recover moneys paid to the collector of taxes and assessments by other persons, for the use of the plaintiff, and for the purpose of redeeming such lands from the tax sale, and which moneys the collector has refused to pay over to the plaintiff, on demand made. *SCRIVENAM, J. dissented.*

The collector acts as a public officer, in receiving the redemption money, upon sales of that nature, but not as the agent of the city.

THIS action was brought, in the city court of Brooklyn, to recover from the city of Brooklyn certain moneys paid to the collector of taxes of said city, for the plaintiff's benefit, by other parties, for the purpose of redeeming premises which the plaintiff had previously purchased at sales for taxes or assessments; and which moneys, it was alleged, the defendant had refused to pay over to him, on demand made. The city court rendered a judgment in favor of the plaintiff, for \$6615.53; from which the defendant appealed.

A. McCue, for the appellant.

John E. Burrill, for the respondent.

EMOTT, J. The plaintiff in this case purchased various lots of land at sales for taxes or assessments, or both. He received the certificates required to be given by the collector, and paid to him the amount of his bids. Afterwards these parcels of land were redeemed by mortgagees or owners, who paid to the collector of taxes and assessments for the city of Brooklyn the amounts paid by the plaintiff on the purchase of such lots respectively, with interest at fifteen per cent. These amounts, so paid to the collector, have not been paid over by him, and after demanding payment of the collector, the plaintiff has brought this action against the city.

I am clearly of opinion that the action cannot be maintained. It will be observed that it is not brought to recover back

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money unlawfully obtained from the plaintiff by the city, or which has been received by the city in any way. A part of the money paid by the plaintiff to the collector upon the sale may have been received for, and paid over to, the city treasurer, but that is not the subject of the present action. What the plaintiff claims is money paid to this officer by other parties, for the purpose of redeeming property previously sold for the taxes. The city had therefore ceased to have any interest in either the property or the moneys which were to result from its redemption. The moneys paid for that purpose were paid to a public officer, for the use of the plaintiff. So the statute declares. (*Charter of Brooklyn, tit. 5, § 29.*) As far as the city is concerned, its relations to the tax, the property, and the purchaser, were at an end when the property was sold and the tax satisfied. What followed concerned only the owners or mortgagees of the property sold and the purchasers at the sale. The collector unquestionably acted as a public officer in receiving the redemption money, but not as the agent of the municipal corporation which is sued in this action.

There is no principle or precedent for the doctrine that a municipal corporation is liable for a wrong or a neglect of duty committed by one of its officers, merely because he is a corporate or municipal officer. When such officers act in its behalf, and within the scope of their duty, they may bind the corporation by the contracting of a debt. When, in the performance of any undertaking by the corporation, its officers commit an injury upon private property or rights, the corporation are liable upon the principle of *respondet superior*. But in all these cases the officer is acting in behalf of the corporation, and they are liable for his acts, to the extent that any other principals would be liable for the acts of his servant or agent.

Where the corporation itself is bound to perform an act, or discharge a duty, it will be liable for the manner in which that duty is discharged, or that act performed, and for a neglect to perform it. The recent cases of *Conrad v. Trustees of*

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Ithaca, (16 N. Y. Rep. 158,) and *Weet v. Trustees of Brockport*, (*Id.* 161, *note*,) proceed upon this principle. Its limitation, with reference to the present inquiry, is that the liability only extends to cases where the duty is cast upon the corporation, and not where it is imposed by the law upon the officer. (See *Martin v. Mayor of Brooklyn*, 1 Hill, 545; *Lorillard v. Town of Monroe*, 12 Barb. 161; 1 Kern. 392.)

In the present case the complaint charges a non-feasance or neglect of a duty to the plaintiff, imposed by statute upon the collector of taxes in the city of Brooklyn. If the collector is in any sense, or in the performance of any part of his duties, the agent of the corporation, it can hardly be said that he is so here. The collector is a civil officer, and the duty of the neglect of which the plaintiff complains is cast upon him by a public statute. In the discharge of this part of his functions he does not act for or in behalf of the corporation. They do not receive a benefit by the redemption money, and are not in any degree connected with the transaction, except by the fact that it is conducted through the agency of an officer elected by the citizens of Brooklyn. In the case of *Lorillard v. The Town of Monroe*, just cited, it was held that a town is not liable for malfeasance or misfeasance of its assessors, and that assessors and collectors of taxes are not, as such, the agents or servants of the towns, nor are these corporate bodies liable for the misconduct of such officers in the assessment or collection of taxes. There is no difference in this respect between the relation of cities and towns to these officers. Cities and villages are liable in certain cases to duties and responsibilities which are not imposed upon the bodies which are called towns in our system. They possess greater powers, and are responsible for the acts of their officers in the exercise of these powers. They enjoy greater privileges, and owe certain duties in compensation for these privileges, for the neglect of which they are liable. But the difference between towns and cities in these particulars is in the greater duties and responsibilities, in respect to certain subjects, cast upon the latter corporations

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themselves, and not in any more extended responsibility for the acts of their officers in the discharge of duties imposed specifically upon them and not upon the corporate body. Especially is this not the case when the same officers exist in both classes of corporations, with duties essentially the same in each case. If a town cannot be held liable for the neglect of a collector to discharge the duties of his office according to the law creating it, I am unable to see any reason why a city should be under any greater responsibility in a similar case.

The complaint in this action does not disclose any cause of action, and the judgment must be reversed.

BROWN, J. concurred.

SCRUGHAM, J. (dissenting.) The decision of this case will involve the consideration of the relation which exists between the defendants, a municipal corporation, and the collector of taxes and assessments of the city of Brooklyn; and whether or not that officer can be regarded as the agent of the corporation.

By section 1 of title 3 of the charter of the city of Brooklyn, he is declared to be one of the officers in whom the administrative powers of the corporation are vested. By section 2 of title 5, he is required to execute a bond to the corporation, conditioned for the faithful performance of his duties, and for accounting for and paying over as directed by law all moneys which shall be received by him as such collector. And by section 30 of the same title, it is made his duty, upon receipt of money paid in redemption of land sold for taxes, to cause the same to be refunded to the purchaser, his legal representatives or assigns.

He is not paid for his services, as are collectors in townships, by a percentage charged on every tax, but by a salary from the corporation, fixed by its common council, and paid out of its treasury; and he is furnished by them with an office, and other conveniences for the transaction of his business, and the

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per centage and other emoluments derived from the transaction of that business belong to the corporation, and are paid into the city treasury. The common council may suspend and remove him for official neglect or misconduct, in the same manner provided for the removal of other officers of the city government. A conversion, investment or loan of any of the moneys received by him, is made by the charter an embezzlement, and declared to be a felony, punishable by imprisonment in the state prison.

Considering all these provisions of the charter, the collector must be regarded as the agent of the corporation; but especially must he be so regarded in reference to all acts under the provisions for the sale of land for taxes, and its redemption; for they are powers appurtenant to the right of eminent domain, and their exercise is reserved to the officers of the state, except in this and a few other instances of municipal incorporations to which they have been granted for convenience; and in performing such duties the collector acts under the authority so specially conferred upon the corporation, and is its agent.

The relation existing between the defendants and their collector of taxes and assessments is very different from that which exists between a town and its collector. The town is only a quasi corporation, possessing very few corporate powers, and none in relation to the collection of taxes, or to the sale of land for taxes, or its redemption. It has no power over its collector during his term of office, either of instruction, suspension or removal. His duties are prescribed by the general statutes, and not by special acts appropriate to his town alone. He receives no compensation for any service from the town, nor does the town furnish him with any conveniences for the transaction of his business, or receive any portion of the emoluments of his office.

The collector of taxes and assessments, having received money in redemption of lands sold for taxes and purchased by the plaintiff, received it to the use of the plaintiff, and it was his duty to cause it to be refunded to the plaintiff; failing to

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do this, and being considered the agent of the corporation, the defendants became liable to the plaintiff for the amount, and they have their remedy against the collector and his sureties upon his bond ; a remedy of which the plaintiff could not avail himself.

But it is urged that the plaintiff cannot maintain this action, because he has not tendered a surrender of the certificate he received at the time of the purchase ; and it is said that the certificate is a lien upon the land sold, and must be delivered up to be canceled. It is provided that the certificate shall be recorded in the collector's office, and shall constitute a lien after it has been so recorded. It is the record, therefore, which makes it a lien, and its surrender to the collector is no more necessary to discharge it, than is the delivery to a county clerk, or register, of a recorded mortgage, necessary to its discharge from record.

By section 29 of title 5 of the charter it is provided that the certificate of the collector, stating the payment in redemption, and showing what land such payment is intended to redeem, shall be evidence of such redemption. Section 30 provides that upon receipt of such moneys, all proceedings in relation to the sale shall cease, and by section 32 the collector is required to note such payment on the original tax or assessment roll, or copy thereof in his office ; and it is declared that such memorandum shall be sufficient evidence of such payment. It is evident from these provisions that the payment in redemption is to be regarded as a discharge of the lien, and that these entries are to be considered a sufficient record thereof ; especially as there is no section requiring a surrender of the certificate, or any other act by the purchaser, to authorize the collector to enter the discharge. It cannot be claimed that the production of the certificate by the original purchaser is necessary to show his title to the moneys paid in redemption ; for no assignment of his certificate would be valid unless notice of it, with the name and residence of the assignee, had

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been filed in the office of the collector. And it is not claimed in this case that any such assignment had been made.

The judgment of the city court should be affirmed.

Judgment reversed.

[DUTCHESS GENERAL TERM, May 14, 1860. *Emott, Brown and Scroggum*, Justices.]

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A person who has been evicted from the possession of lands, can, without showing any title in himself, maintain an action for them, against the grantee of his disseisor, who is also without title.

One who is a purchaser at a sale under the foreclosure of a mortgage made by a party disseised, while in possession, can assert the same rights as the disseisee, and recover upon his possession, without proving that he has ever been in possession, himself.

ACTION to recover possession of land at New Rochelle, in Westchester county, which Samuel B. Broad, being in undisturbed possession under claim of title, on March 25th, 1844, mortgaged to one Clinton Roosevelt. Soon after he gave permission to William Broad, his brother, to occupy a room in the house on the premises, and under a verbal license from him, in April or May, 1844, Albert Badeau forcibly, as against Samuel B. Broad, entered. In the fall of 1844, the defendant entered under color of purchase from Badeau, and has since occupied. In 1855 default was made on Roosevelt's mortgage, it was foreclosed, and at the foreclosure sale the plaintiff purchased the premises in question. The referee found that Broad was lawfully in such possession as would have sustained a suit brought by him against Badeau in default of his showing a right to enter, but that as against the defendant entering peaceably under color of purchase from the disseisor, Broad's action would not lie unless he showed title; and secondly, that the plaintiff, never himself having been in

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actual possession, and claiming merely as Broad's grantee, could only recover by showing title. The referee found that no title was proved in Broad; he also rejected the only evidence offered to show title in Badeau, or the defendant; so that, by his finding, title was shown in neither the plaintiff nor the defendant. Judgment was entered, at a special term, upon the report, dismissing the complaint, with costs, and the plaintiff appealed.

John E. Parsons, for the appellant.

S. F. Cowdrey and *J. S. Lawrence*, for the respondent.

By the Court, EMOTT, J. The land for which this action was brought was owned originally by one Sarah Norroway Clarke. She died in 1810, intestate, seised and in possession of the premises. She was unmarried, and left two sisters, both of whom were aliens, and an aunt, Sarah Norroway, the wife of Anthony Norroway. This Mr. and Mrs. Norroway were living upon the property with Miss Clarke, and after her death they continued in the occupation of it as long as they lived. Anthony Norroway died in 1831, and Sarah Norroway in 1832. It does not seem that they made any claim to be the owners of the property, although, so far as the facts appear, Sarah Norroway was the only person capable of inheriting lands, who was or could have been an heir of Miss Clarke, her niece. Mr. and Mrs. Norroway were inhabitants of this country before the revolution, and continued here afterwards, thus becoming citizens, and capable of taking lands by descent. The two sisters of Miss Clarke were aliens, as I have already said. One of them was a Mrs. Walker. She had an illegitimate daughter, one Mary Ardley, who came to this country after the death of Miss Clarke, and lived upon the premises with the Norroways during their lives, and afterwards until the year 1841. Both she and her mother were aliens, and independent of the defect in her birth, both of them were on this

account disqualified from inheriting to Miss Clarke, or at least from being a source of title to either of the parties in this suit. In 1836-7, Mrs. Broad, the other sister of Miss Clarke, came to this country, and she also lived upon the premises from that time until her death, which occurred in 1841. Then Samuel B. Broad and William R. Broad, her sons, came upon the lands and lived there, with Mary Ardley, until some time in 1842, when Miss Ardley left and returned to England. After this, Samuel B. Broad had possession of the premises until he was disseised by the defendant's grantor. Neither Mrs. Broad nor her son William was ever naturalized. Samuel B. Broad was naturalized in 1844. In March of that year Samuel B. Broad, who was then in possession, executed a mortgage of the premises to Clinton Roosevelt, which was subsequently foreclosed and the property bought by the plaintiff. After this mortgage and before the foreclosure, the defendant's grantor entered and disseised Broad, and the plaintiff has never been in actual possession. Unless through Mrs. Norroway, the plaintiff, or his mortgagor or grantor, cannot trace a title up to Miss Clarke, on account of the alienage of the mother of Broad. Whether title could be made to Broad through Mrs. Norroway was a point not discussed upon the argument, and which I shall not consider, as it is not material in the view I take of the case. I assume that the plaintiff must stand entirely upon the possession of Broad, without proof of title. The defendant's grantor was one Badeau. He entered upon the premises forcibly and disseised Samuel B. Broad in 1844. He seems to have made a claim of right or title from other parties, but no such title is shown, nor any right in him. In the same year he conveyed to the defendant, who then went into possession.

The first question which the case presents is whether a person who has been evicted from the possession of lands, can, without showing title in himself, maintain an action for them against the grantee of his disseisor, who is also without title. Another question is, whether the present plaintiff, who is a

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purchaser under a foreclosure of a mortgage made by the party disseised while in possession, can assert the same rights as the disseisee, and recover upon his possession.

It is conceded that Broad could have recovered against Badeau upon the strength of his prior possession, but it is contended that he could not recover against the defendant, who received a conveyance from Badeau while he was in possession and entered peaceably. Or, if Broad could recover against the defendant, it is urged that the plaintiff could not, because the mortgage made by Broad was not foreclosed until after he was disseised, and the plaintiff personally has never been in actual possession.

Questions of this nature have been more frequently presented to the courts of this than of our mother country, by reason of the greater frequency of their occurrence in a country whose settlement is comparatively new and sparse. There are, however, some early cases upon the first point, cited from the English books. Thus in *Bateman v. Allen*, (*Cro. Eliz.* 437,) a special verdict found an entry on the plaintiff's possession, without finding title or a prior possession in the defendant, and the plaintiff had judgment. The same principle will be found in *Allen v. Rivington*, (*2 Saund.* 111,) to the effect that where priority of possession appears for the plaintiff and no title in the defendant, the plaintiff shall have judgment.

In *Jackson v. Hazen*, (*3 John.* 22,) the principle was applied in favor of a plaintiff who had been disseised by a tortious entry without any claim or colour of right or title from any person. The same was the case in *Jackson v. Harder*, (*4 John.* 202, 210.) The defendant showed no pretense or color of title to justify his entry, and the plaintiff recovered against him on a possession of eight or ten years under a claim and color of title. *Smith v. Lorillard*, (*10 John.* 338,) is a leading case, and cannot be distinguished from the present case upon the question I am now considering. The defendants there were purchasers from a disseisor, bona fide purchasers,

as was urged by their counsel, and had made valuable improvements, and the argument was pressed upon the court that they were not intruders nor trespassers. But the court refused their assent to any distinction in their favor on that ground. Ch. J. Kent said, "A prior possession, short of 20 years, under a claim or assertion of right, will prevail over a subsequent possession of less than 20 years, when no other evidence of title appears on either side." The rule is explained as requiring that the prior possession of the plaintiff should not have been voluntarily relinquished without the *animus revertendi*, and the subsequent possession of the defendant should have been acquired by mere entry without any lawful right. All the facts which the doctrines of this judgment require would be found in the case at bar, and the judgment would apply precisely to this case, if it were between Broad and the defendant as grantee of Badeau. The referee seems to have supposed that some peculiar presumption was drawn in favor of the plaintiff, in *Smith v. Lorillard*, upon the facts of that case. But the chief justice explains with admirable clearness the presumptions upon which the law acts, and how they are shifted by proof of successive possessions. The first or oldest possession which can be shown affords a presumption which can only be overreached by proof of title, or a subsequent adverse holding long enough to bar an entry. The cause was decided by the application of this presumption or *prima facie* proof of title arising out of prior possession by the plaintiff, and the want of title in the disseisor or the defendant, his grantee, to overcome that presumption. So the case has been understood and accepted in all the subsequent decisions. In *Jackson v. Rightmyre*, in the court of errors, (16 John. 325,) the rule is stated from the case of *Smith v. Lorillard*, by the chancellor, that a prior possession under a claim of right not voluntarily abandoned, will prevail over a subsequent possession without lawful right, where no proof of title was made on either side. That case was taken out of the rule because the junior possession was obtained under a

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judgment in ejectment against the first possessor, although this judgment was recovered by default. The presumption founded on the prior possession was destroyed by its termination by the judgment of a court. The same principle will be found in *Jackson v. Hubble*, (1 Cowen, 613,) in *Jackson v. Blodgett*, (5 id. 202,) and in *Jackson v. Walker*, (7 id. 637.) The case of *Whitney v. Wright*, (15 Wend. 171,) again expressly recognizes the same doctrine, and that case was also distinguished from those first cited by the abandonment of the prior possession, and by the fact that the defendant entered into his subsequent possession under a recovery in an action of ejectment.

That the defendant is in by a conveyance from Badeau, and was not himself the original disseisor, does not affect the question. The deed by which he claimed did not afford evidence of title which could rebut the presumption from the prior possession of Broad. It could not convey any other or greater right than the possessory right belonging to Badeau, which was inferior to that of Broad. Nor was it an act which of itself so changed the nature of the estate, as to put the disseisee not only to a different remedy, but to additional proof. An alienation by a disseisor did not have, in all respects, the same effect as his death and the consequent descent. A descent cast was held to toll an entry, for reasons which are not applicable to the case of a conveyance. That was upon the ground that the heir of the disseisor, upon whom the descent was cast, came in entirely by the act of the law; that the disseisee should not have allowed the disseisor to remain in possession all his life, and upon the feudal reason that there should be a tenant to do the feudal services after the death of the disseisor in possession. (See *Co. Litt.* 238, *et seq.*; and *Hargrave & Butler's Notes*, and 1 *Black. Com.* 176.) Even in the case of a descent cast, however, although the entry was taken away, the disseisee had his writ of entry or of assize "in the per" as it was said, against the heir, and the same writ against the feoffee or alienee of the disseisor. Neither

the descent nor conveyance divested or destroyed the right of possession in the disseisee, or put him to a trial of his mere right or title. It only drove him to an action to dispossess the heir, when an entry alone would have dispossessed the ancestor. All these writs of entry and of assize were strictly possessory actions, and it was not until these were barred by time or by a judgment on the possession, that the party ousted was driven to a writ of right. At common law two descents or two conveyances cut off the writ of entry or of assize, but this was remedied by the statute of Marlbridge (52 Hen. 3, ch. 30) which introduced a new writ called a writ of entry in the post, which lay without mention of degrees, in all cases where the original entry or ouster was wrongful, and the subsequent possession had not been protected by a judgment, or lasted long enough to bar a possessory action. In the case of *Smith v. Lorillard* it was assumed by the court, without any reasoning to prove it, and against the argument of the defendant's counsel, as I have already noticed, that the purchaser from the disseisor was in no better condition than the disseisor himself. The action of ejectment was the successor and substitute of the ancient possessory real actions, and the rules by which these actions are to be tried cannot be unlike.

The referee was also in error in supposing that the plaintiff could not recover because he personally had never been in possession. There is of course a sense in which it is true that the grantee of a person who has or has had the possession of real estate, cannot recover against a disseisor where his grantor might. But the strength of his title would not avail a party in a case where he was met with such a difficulty; nor is it strictly true that a deed which conveys no title does not convey any possession, that is any right to possession, for actual possession of course is not conveyed by a deed. The difficulty in the case supposed by the referee would be, that the deed would be void because made by a person out of possession, and would not convey any thing. The importance of the question of actual possession, in such a case, however, would

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be to determine whether the grantor or grantee shall bring the action. If the grantor was not in possession when the deed was made, the deed is void as to the person actually in possession, and the action must be brought in the name of the grantor. Even in that case the action is not lost, nor are the principles upon which it proceeds changed. If Broad had made a deed of these premises to the plaintiff while he was out of possession of them, the consequence would be not that the plaintiff could only recover on proof of his title, but that he could not recover at all. The action must have been brought in Broad's name, and then it would have been tried upon the same principles which must govern this suit.

But this is not the case of a deed made while the grantor was out of possession. The plaintiff's title came through the foreclosure of a mortgage, made while the mortgagor was in possession. The actual deed to him was made in pursuance of a judicial sale based on this mortgage, and was not open to objection because the grantor or mortgagor was not in possession when the sale took place. It vested in the grantee all the title of the mortgagee, and carried with it all the title of the mortgagor, and related to the date of the mortgage. It was as if Broad had conveyed to the plaintiff at the time when he made the mortgage. The plaintiff therefore stood precisely in the place of Samuel B. Broad, and can recover in this action upon the same proof that he could.

As the decision of the referee was incorrect upon both these points, the judgment entered upon his report must be reversed and a new trial ordered at the circuit, the costs to abide the event.

[DUTCHESS GENERAL TERM, May 14, 1880. *Lott, Emmott and Brown, Justices.*]

TERRY and others, *appellants*, vs. DAYTON and others,
respondents.

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A party to the record in proceedings before a surrogate upon the final accounting of an administrator, is not a competent witness.

Neither the act of Dec. 14, 1847, authorizing parties in civil suits to obtain the testimony of the adverse party, nor the 399th section of the code, authorizing parties to be examined on their own behalf, has any reference to proceedings before a surrogate.

It is erroneous for a surrogate to allow an administrator's account or claim against the estate, whatever may be the force of the proof to establish it in the first instance, unless it is accompanied by the affidavit of the administrator stating that such claim is justly due, and that no payments have been made thereon, and that there are no offsets against the same, to the knowledge of the claimant.

Where it appears, on the final accounting of an administrator before a surrogate, that the deceased had in his lifetime made advancements to certain of his children, in money, and that the deceased left real estate, which descended to his heirs; *Held* that the advancements, being in money, were properly chargeable in preference on the personal estate, and should be taken into the account by the surrogate, in the distribution of the estate.

The rule required by equity, and that intended by the statutes, is that advancements made by real estate shall go first against the real estate descended, and be charged upon the shares of heirs and against those who represent those shares; while, on the other hand, advancements made in personal estate or money shall be first accounted for in the distribution of the personalty, and be charged upon the next of kin as such, and upon the shares which they represent.

APPEAL from a sentence or decree of the surrogate of the county of Suffolk, made upon the final accounting of Eleazer Z. P. Dayton, administrator of, &c. of Eleazer Dayton, deceased.

Wm. Wyckham, for the appellants.

George Miller, for the respondents.

BROWN, J. Clark Hulse, the husband of Mary E. Hulse, and one of the contestants in this proceeding, was not a competent witness, and was properly rejected by the surro-

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gate. Neither the act of the 14th Dec. 1847, to which the counsel for the appellants refers, nor the code of procedure, has any reference to proceedings before the surrogate. He was a party to the record, and that was enough to exclude him. (*Willcox v. Smith*, 26 Barb. 317.)

The principal question presented by this appeal relates to the account for \$1274.75 claimed by Eleazer Z. P. Dayton, the administrator, to have been due to him from the intestate at the time of his death, and allowed by the surrogate's decree. This account consisted of 27 items, several of them items of interest, and extended from June, 1852, to May, 1856. The parties to the account were father and son, living together in the same house, and there were no credits. This account was objected to by the appellants, (who are some of the next of kin,) upon the final accounting before the surrogate. It was not sworn to or verified by the administrator, and when he was called and proposed to be examined as a witness by the appellants, his counsel objected, and the objection was sustained.

The 35th section of the act in regard to the duties of executors and administrators in the payment of debts and legacies, provides that upon the presentation of a claim against the estate of any deceased person, the executor or administrator may require satisfactory vouchers in support thereof, and also the affidavit of the claimant that such claim is justly due and that no payments have been made thereon, and that there are no offsets against the same, to the knowledge of such claimant. In the present instance the account of the administrator was proved to the satisfaction of the surrogate, but he claimed, and now claims, that a rule applicable to all the other creditors of the estate has no application whatever to him, and that he is relieved from the necessity of saying under his oath that there have been no payments made upon the account, and that there are no offsets against the same. In this he is mistaken. In *Williams v. Purdy*, (6 Paige, 166,) the chancellor says, "He must, like other creditors, not only verify the

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justice of his claim by his oath, but if it is objected to he must establish it by legal evidence, in addition to his own oath. The object of requiring the affidavit of the creditor in such cases is not to prove the existence of the debt, as it is not evidence for that purpose. But it is to prevent the exhibition of fictitious claims against the estate of the decedent which have been discharged by him in his lifetime. And also to prevent the allowance of claims against which there existed a legal offset known only to the party presenting such claim, and which those who are interested in the estate of the decedent may be unable to establish by legal proof." (*See also Clark v. Clark, 8 Paige, 152; Dayton's Surrogate, 478.*) It was an error, therefore, to allow the administrator's account or claim against the estate, whatever may have been the force of the proof to establish it in the first instance, unless it was first verified by the oath of the administrator. The surrogate erred in his construction of the statutes of distribution and descents. I concur in the reasoning of Mr. Justice Emott upon this question. The advancements proved to have been made to Eliza A. Terry, Hannah Terry, and Mary E. wife of Clark Hulse, should have been charged against their shares respectively.

The decree of the surrogate must be reversed, so far as the allowance of the administrator's account or claim against the estate is concerned; and also in respect to the advancements to the three daughters of the intestate: and he should proceed to a re-examination, and take the account de novo. No costs are allowed to either party, upon this appeal.

EMOTT, J. I agree with Judge Brown in the views which he has taken of that part of this case which is discussed in his opinion, and I shall not advert to the points which he has examined. The answer of the respondents, to the petition of appeal, however, brings before us another question. This was a final accounting of the administrators of an intestate. It appeared that the deceased had in his lifetime made advancements to certain of his children. Some of these children were

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living, and others had died leaving children, who were parties to this proceeding. It was claimed that these advancements should be taken into the account in the distribution of the estate. On the other hand, it was shown that the deceased left real estate which descended to his heirs. It was contended that this brought the case within the exceptions in the statute of distributions, (2 R. S. 98, § 78,) and that therefore the advancements could not be taken into the accounts of the estate in the surrogate's court. The surrogate held that the case was brought within the exception in the statute, and that he had no jurisdiction to allow the advancements, or take them into account in directing distribution of the personal estate. The advancements in question, it will be seen, were made in money, to the intestate's four daughters. I think the surrogate was in error as to his power and duty in the premises. By noting briefly the history of the law of advancements, and of the various statutes affecting it, we shall be able, I think, to see the mistake and its occasion, and also the true state of the law upon the subject. 1. At common law there was no notice taken of advancements, except in the case of estates in coparcenary, as to lands, and by the custom of London, of York and of Scotland, as to goods. (2 Com. 190, 517.) The case of lands held in coparcenary was the only instance of a title acquired by a number of persons jointly by inheritance, except under the custom of gavelkind in Kent. I do not find that the law of hotchpot or of advancements was ever applied to this species of estate. As to coparceners, the only application of the law of hotchpot was in the case of lands given in frank marriage, which was the only gift which was looked upon as an advancement in respect to lands. So that the only case in which by the general law of England lands descended to more than one person in equal shares—i. e. in the case of a man dying intestate and leaving daughters only—in which event they took as coparceners; in that case the law compelled any one of the daughters who had been advanced by a gift of land to bring her advancement into hotchpot, if she would

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take any share of the lands descended. The law of hotchpot was not precisely like the present law of advancements; but what is material to the present question is, that in the case of lands descended, the law did not regard any gifts as advancements, except gifts of lands; for estates in frank marriage were such exclusively. (2 Com. 115.) These advancements of land were accounted for in the division of an estate descended.

2. When the rights of children and relatives were firmly established against the claims of the administrator, and the statute of distribution was passed, (*Statutes of 22, 23 and 29 Charles 2,*) the same provision was introduced in substance which we now have, and which prevailed in certain parts of the realm, by custom, before. (2 Com. 517.) This extended to all advancements, whether of lands or goods; and it included of course as well the heir as the other children. The law of primogeniture forbade any interference with the inheritance where there was an heir entitled to the whole. But where the estate went into coparcenery then these advancements of lands had to be accounted for, and when there was personal estate all advancements, whether they had been made by lands or goods or money, were taken into the account in the distribution of the personal estate.

3. When primogeniture was abolished in this country after the revolution, although all the heirs at law took in the same manner as coparceners did at common law, there was no rule or provision for deducting advancements from the share of an heir in real estate. As to personal estate, the statute of distributions contained a provision similar to the English. (*See 1 R. L. 311, 313.*) But there was no such provision in the statute of descents. (*Id.* 52.) If therefore a child had been advanced to any amount, and the father died leaving only real estate, the advancement was not taken into account.

4. When the revised statutes were passed, the legislature introduced §§ 23, 24, 25, 26, to remedy what they considered an injustice in this particular, and to provide for an accounting and adjustment of all advancements against the shares of the heirs at law in the real

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estate which descended to them. At the same time they retained the existing provisions in the statute of distributions. (2 R. S. 97, §§ 76, 77, 78.) These latter sections apply, as did the former and equivalent sections in the former statute of distributions (1 R. L. 313,) to personal estate only, although advancements of real estate are to be included. The sections of the present statute of distributions are not to apply when there shall be any real estate to descend to the heirs of the intestate. This means when there is any real estate at the time of the death. The statute must be construed as referring to that time, and the surrogate was right in supposing that in such a state of facts as the present this statute is excluded by its terms.

But this does not leave us without any provision upon the subject, when there is real estate; nor does it throw the burden and settlement of advancements upon the real estate exclusively. It leaves such a case under the provisions of the other statutes, of the 23d, 24th, 25th and 26th sections of the statute of descents, which apply both to real and personal estate, and govern the distribution of the former as well as the descent of the latter. This statute will apply and regulate both in all courts when either comes in question. It is a broader statute than the other, which is limited to a single case—that of a deceased leaving only personal estate. 6. I think, therefore, the surrogate was mistaken in supposing that his distribution of the personal estate was not affected by the statute and by the fact of advancement because there had been real estate also. 7. A question of more difficulty is how these advancements are to be accounted for when the parties entitled to the real and personal estate are not the same.

Upon reflection I am convinced that the rule required by equity, and that intended by the statutes is, that advancements which were made by real estate should go first against the real estate descended, and be charged upon the shares of heirs and against those who represent those shares; while on the other hand, advancements made in personal estate or

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money should be first accounted for in the distribution of the personalty, and be charged upon the next of kin as such, and upon the shares which they represent.

In the present case the advancements were in money, and therefore properly chargeable in preference on the personal estate which is in controversy here. There is nothing inequitable to result from the previous position of the real estate.

My brethren concur with me, after consideration, in the views I have indicated of this part of the case. We are of opinion that the decree must be reversed, for the reasons assigned in both the opinions delivered, and the case remitted to the surrogate's court, with directions to proceed and state the account anew.

[DUTCHESS GENERAL TERM, May 14, 1860. *Lott, Emott and Brown*, Justices.]

RANSOM YALE *vs.* ELIZA ANN DEDERER, by her next friend,
and NICHOLAS A. DEDERER.

A married woman can, by signing a note with her husband, as his surety, intending thereby to charge her separate estate, and agreeing by parol that such estate shall be charged, bind her separate estate, in equity, to the payment of the note.

APPEAL, by Eliza Ann Dederer, from a judgment entered at a special term, after the second trial of the case. The first trial is reported in 21 *Barb.* 286. The judgment there ordered was affirmed at a general term, but reversed in the court of appeals, (18 *N. Y. Rep.* 265.)

The action was brought to charge the separate estate of Eliza Ann Dederer, the wife of Nicholas A. Dederer, with the payment of a promissory note, in the words and figures following:

"\$998. On the first day of May next, we, or either of us,

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promise to pay Ransom Yale or bearer, nine hundred and ninety-eight dollars, with interest, for value received.

Greene, Dec. 26, 1853.

N. A. DEDERER.

ELIZA ANN DEDERER."

The consideration of the note was proved, and also that Mr. Dederer had become insolvent, prior to the commencement of this action. It was admitted that Mrs. Dederer was the owner in fee simple of three farms of land, and that her separate estate was sufficient to satisfy any judgment that could be rendered in this action. The evidence on the question of intent by Mrs. Dederer to charge her separate estate was as follows: *Albert Yale* testified that he was the plaintiff's brother, and that he knew of the selling of the two lots of cows to Mr. Dederer. Mr. Dederer said he wished to buy some cows, and the plaintiff said he would like to sell him some if he could be made safe. The plaintiff said he wanted to sell them so that he could be safe, collect the money when he wanted it, and when it became due; and Mr. Dederer asked what would make him safe; and the plaintiff said your wife's note and yours together would be safe, I think; that would buy the cows. The plaintiff asked Dederer if there were any claims upon Mrs. Dederer's property, and he said there was not, or not enough to amount to any thing. The same conversation occurred at the time of the purchase of the second lot of cows. At the time of the first conversation, the plaintiff said, I suppose it is no more than right that she should sign the note, for I suppose the cows are going on her's and your premises. Mr. Dederer said I think I shall distribute them about, or something to that effect. I think Mr. Dederer mentioned he was going to drive them to the Warner farm. Mr. Dederer gave a note for the twenty-one cows at this time. He said when you come down to Greene I will give my own note with my wife, or a satisfactory note. It was to be a note of Mr. Dederer and his wife, in satisfactory form. Mr. Dederer lived at Greene village. On the sale of the second lot the conversation and agreement was substantially like the first.

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Cross-examined. "I was a partner with my brother at the time of the sale of both lots of cows and when the notes were given; I parted with my interest in them in the fall of 1853; can't say what month. He took these notes and I took others; the notes that were first given by Mr. Dederer were not signed by Mrs. Dederer. At the time I sold out the notes, I think Mrs. Dederer had signed the notes. Shortly after the sale the plaintiff went to Greene to get Mrs. Dederer to sign." *James H. Wavle* testified: "I lived in Smithville, on the Warner farm, in February and March, 1852; I drove about twenty cows, bought of the plaintiff, to the Warner farm. The cows were selected out before I got there; these cows were selected out and in a lot by themselves. Mr. Dederer told me what cows to drive over there." Cross-examined. "These cows were left on the Warner farm from four to six weeks; they were most of them taken to the King farm, owned by Mr. Dederer; they were taken to the Warner farm to eat up some hay, there being a scarcity of hay at the King farm. I was at work for Mr. Dederer then. Mr. John Atwater came after the cows and took part of them at that time. I went as far as the Flats to help to drive them. Atwater at that time occupied the King farm; none of the cows were milked on the Warner farm; as they began to make bag they were driven to the King farm. The Warner farm was Mrs. Dederer's farm." *Ransom Yale*, the plaintiff, testified: "I am plaintiff in this suit. On February 14th, 1852, Mr. Dederer came to my place and wanted to purchase some cows of me. I asked if he was going to pay for the cows then, and he wanted to get credit. I told him I would give credit for the cows if he could give me his wife's note with his for the payment for the cows. I inquired whether his wife's property was encumbered; I inquired into her circumstances, and after making these inquiries I sold him twenty-one cows at \$26½ per head; he was to give me his and his wife's joint and several note; I wished to get a note to make her holden. I think he left the cows over night, and the next day brought a

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note signed by Mrs. Dederer and him. I won't be sure about this ; I think it was due in November, and that I went to Greene in December and got the note renewed and signed by both. In March 19, 1853, I sold him twelve cows at \$29 a head, at Smithville ; he offered to give me his wife's and his note ; he told me there were no claims upon the Warner farm. I was to take his note for the twelve cows, payable in the fall, and when I went to Greene he was to get his wife to sign it ; he told me, when he bought the twenty-one cows, that he was going to drive them to the Warner farm ; I knew that she owned the Warner farm ; the farm was worth \$5000 or \$6000. On the 26th day of December, 1853, the two notes were past due ; I went to Greene, to Mrs. Dederer's house ; Mr. Dederer and I went to his house together. I told him I came for my pay ; he said he could not conveniently pay then. Mrs. Dederer was in and out ; Mrs. Dederer was there part of the time and part not ; she was in and out of the room ; I said I was afraid of losing it to let it run ; he said if he wasn't able his wife was, and that I could make myself perfectly secure ; I said I wanted the money ; he said he thought if I was secured I could wait, and proposed giving his wife as security again ; I told him if I was safe I could do it, I supposed, and as he proposed giving his wife, I inquired into the circumstances, again, of her property ; he told me there was a mortgage of \$2500 given upon the Warner farm since the last sale of cows ; I told him I was afraid if I didn't collect it then I would have trouble about collecting it ; Mr. Dederer thought I would be safe with his note and his wife's. We then reckoned the interest on the two notes and found that it was \$998 ; he wrote a note and went into another room to get his wife to sign it ; think she was not in ; he then signed the note ; he then took it out and soon the note came back signed N. A. Dederer and Eliza A. Dederer ; she came back with him ; I asked her if she had changed her name ; why the note was not signed as the note had been previous by Eliza Ann Dederer ; she said she sometimes signed it so ; I told her I wanted

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it right; I told her that if I extended the time I depended upon her for security for payment of the note; Mr. Dederer said you needn't be afraid, if I am not able to pay it, my wife is; she said yes, if Nicholas is not able to pay it I am; then we drew up a new note and the note in suit was executed at that time, and I gave up the old paper and took the new one; I think I have seen some of the cows on the Warner farm in May or June, 1854; I think I saw about twelve on the Warner farm; I will correct that; I think it was May or June, 1853; I think it was in the spring before the assignment; I think I saw the same cows in Willett; I saw the cows in pasture at the Warner farm, which was a dairy farm."

The court gave its decision in writing, which contained the following specification of facts: The defendants made their note, stated in the complaint, at the place and date thereof. The consideration of the note was two promissory notes (and otherwise as hereinafter stated) made by the defendants to the plaintiff, and which notes were surrendered on the execution of said note in action; the consideration of which two notes, so surrendered, was cows previously sold by the plaintiff to the said Nicholas A. Dederer, and which cows the plaintiff refused to sell said Dederer, except upon condition that the defendant Mr. Dederer should procure his wife, the other defendant, to sign the notes with him, therefor, as surety. Mrs. Dederer, at the time of the sale as well as at the time of making the said several notes, had a separate estate consisting of three farms in different towns in Chenango county, and of personal property sufficient to satisfy any judgment that can be rendered herein. The defendant Mr. Dederer had become insolvent prior to the commencement of this action, and the plaintiff had obtained a judgment against him on the note in action, upon which an execution had been issued and returned *nulla bona*; Mr. Dederer had made a general assignment of his property for the benefit of his creditors. The note in action was signed by both defendants. The defendant Mrs. Dederer intended to charge, and did expressly charge, her sep-

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arate estates for its payment, as I find from the evidence in the case. And the giving of the note, together with the express charge of Mrs. Dederer's separate estate, formed the consideration of the plaintiff's surrender to them of the said two notes, and also of his granting them further time for the payment thereof.

The court in form following stated the conclusions of law. "There is due to the plaintiff, on the promissory note made by the defendants, the sum of \$1389.59, and the same is an equitable lien upon the personal and real estate of the defendant Eliza Ann Dederer, and the amount last aforesaid, with interest from the date of this trial, and the plaintiff's costs, to be adjusted by the clerk of the county of Chenango, with interest thereon from the date of said adjustment, should be paid to the plaintiff from the said personal and real estate of the said Eliza Ann Dederer."

Selah Squires and Henry M. Hyde, for the appellant.

Henry R. Mygatt, for the respondent, cited the following authorities, in addition to those referred to in this case in 21 *Barbour*, 289, viz: *Stamford v. Marshall*, (2 *Atk. Rep.* 68.) *Grigby v. Cox*, (1 *Ves. sen.* 517.) *Pybus v. Smith*, (3 *Bro. C. C.* 340.) *Parkes v. White*, 11 *Ves.* 209, 237.) *Owens v. Dickinson*, (*Craig & Philips*, 53,) affirms the same case in 3d *Beavan*, and decides that a *feme covert* can, as to her separate estate, enter into contracts in the same manner as a *feme sole*, and that her contracts and engagements upon this principle are equally binding whether they are written or merely verbal. Lord Cottenham says, "It certainly seems strange that there should be any difference between a contract in writing, where no statute requires it to be in writing, and a verbal promise to pay. It is an artificial distinction." *Additional American cases.* *Harris v. Harris*, (7 *Iredell's Eq. Cas.* 111,) decided in 1850. *Bell & Terry v. Keller*, (13 *B. Monroe*, 384,) decided in 1852. *Ozley et al. v. Ikelheimer*, (26 *Alab.*

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Rep. 332,) recently decided, wherein the English cases were cited with approbation, which show that when a debt is in other respects such as to be a charge on the separate property of a married woman, it will make no difference whether the engagement in which it originates is verbal or written. *Whitesides v. Cannon*, (23 *Missouri Rep.* 471,) decided in 1856. *Sillard v. Turner*, (16 *B. Monroe*, 374.) *Burch v. Breckinridge*, (1 *id.* 482.) *Imlay v. Huntington*, (20 *Conn. Rep.* 149, 175.) *Cravens v. Brooks*, (8 *Texas Rep.* 243.)

MASON, J. When this case went to the court of appeals before, there was no evidence, in the case, of an intent on the part of Mrs. Dederer to charge her separate estate with the payment of this debt of the plaintiff, except the bare fact that she signed the note with her husband as surety for him. In short, there was no evidence of an intent to charge her separate estate with the payment of the debt, except what equity would infer from the act of signing. I held, on the first trial, that the fact that she signed the note as surety for her husband furnished of itself evidence of an intent to charge her separate estate; acting upon the doctrine of some of the cases in equity, which hold that the wife must intend something by signing, and as she knew that she could create no personal obligation or liability by signing, she must be deemed to have intended to charge her separate estate in equity. (21 *Barb.* 286.)

The court of appeals reversed the judgment, and have certainly settled the rule that from the bare act of signing a note as surety for her husband, no such intent to charge her separate estate in equity shall be inferred, and that she does not charge her separate estate by the bare act of signing a note as surety for her husband. The case is now changed by evidence on the last trial, which not only shows that she signed the note as surety for the husband, but the evidence shows further and independent of the act of signing, that she did intend to charge her separate estate, and did charge it with the payment of this debt, if any verbal agreement or understanding between

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her and the plaintiff to that effect can charge it. This brings us to the real question in the case: Can a married woman, by signing a note as surety with her husband, intending thereby to charge her separate estate, and agreeing verbally or by parol that her separate estate shall be charged, bind her estate, in equity, to the payment thereof?

The court of appeals did not decide this question against the plaintiff, when the case was before that court on the former appeal. Judge Comstock admits that when a married woman holds the fee of lands, under the acts of 1848 and 1849, she may charge it. He says, (18 *N. Y. Rep.* 272,) "My conclusion therefore is, that although the legal disability to contract remains as at common law, a married woman may, as incidental to the perfect right of property and power of disposition which she takes under the statute, charge her estate for the purposes, and to the extent, which the rule in equity has heretofore sanctioned in reference to separate estates." It was admitted on the last trial that Mrs. Dederer is the owner in fee simple absolute of the real estate charged in the complaint herein as her separate estate, and that she became seised thereof in fee subsequent to the acts of 1848 and 1849; and Judge Harris, at page 281, speaking of this very case, says that a married woman will charge her separate estate "*when the circumstances of the case are such as to leave no reasonable doubt that such was her intention.*" He says again, at page 283, "It is simply a rule of evidence. All agree," he adds, "that when the wife has expressly charged the payment of a debt upon her separate estate, whether it be her own debt or the debt of another, such charge is valid, and will be enforced."

He regards the right of enjoyment of separate property as necessarily including the right of disposition, and the power of disposition embraces the power to charge her estate; and he adds, "when she does this of her own free will, uninfluenced by any unfair practices, however injudicious the act, the charge must be enforced."

Applying these principles to the case before us, there can be

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no doubt of the defendant's liability, in this case. This certainly is no new doctrine in regard to the power of a married woman in equity over her separate property. It is the clear and uncontroverted doctrine of the court of chancery in England and of the courts generally in this country, and, as I understand, is the acknowledged doctrine in equity of the courts of this state. The courts have not differed over the question of her capacity in charging her separate estate, where the evidence shows that there was no doubt in regard to her intention to charge it. The difficulty seems to have arisen as to what shall be deemed sufficient evidence to establish such intention; and upon this question the court of chancery in England has gone further than the courts of this state. The decisions in England have gone the length of holding, that where the wife unites with her husband in giving such a note or obligation to pay his debt, it shall, without any other evidence of her intention, be charged upon her separate estate; and such is the doctrine of many of the state courts of this country. The court of appeals has said in this very case, such is not the rule with us. They have not decided, however, that where it is shown by extrinsic evidence, that she actually intended to charge her separate estate, by signing with her husband for his debt, she does not charge her separate estate. Such a doctrine cannot be held without denying to her the power in equity of disposing of her separate property—a power which has hitherto been universally conceded to her. She certainly can be no longer regarded as a *feme sole* in equity, as regards her separate property, if this doctrine is to prevail.

I am of opinion, for the reasons stated, that the judgment of the special term should be affirmed.

PARKER, J. concurred. CAMPBELL, J. dissented.

BALCOM, J. took no part in the decision, having been counsel in the case. Judgment affirmed.

[BROOME GENERAL TERM, May 8, 1860. *Mason, Balcom, Campbell and Parker*, Justices.]

BELLINGER vs. CRAIGUE.

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The law implies an undertaking, on the part of a physician or surgeon, that he has ordinary skill, and that he will execute the business intrusted to him with ordinary care and skill. If he fails in this duty, he is guilty of a default in his undertaking, and cannot collect the pay for his services, but is liable in damages to the person who employed him.

Where a physician was employed to treat a broken limb, and made several visits in the course of his employment; *held* that the contract was *entire*, and that performance must be shown, to entitle him to recover any thing for his services.

In the absence of evidence that the physician has failed in his duty, *it seems* that performance will be inferred, upon the principle that the law will not presume a party guilty of a breach of duty, or of negligence or fraud.

A fact impliedly averred, may be traversed in the same manner as if it was expressly averred; and the general denial, of the code, puts all the allegations of the complaint in issue, whether expressed or implied.

Where a physician sued a party, before a justice of the peace, for services rendered by him in treating a broken limb, and the defendant appeared and put in an answer containing a general denial; *held* that the fact of performance of the contract, by the plaintiff, was impliedly averred in the complaint and denied by the answer; and that the judgment of the justice in favor of the plaintiff, for his services, necessarily included the fact of performance on the part of the plaintiff, so that it could not be again litigated between the same parties.

Where a defendant went to trial, in a justice's court, on his general denial of a complaint for professional services as a physician, and withdrew all claim for *malpractice*; *held*, nevertheless, that the question was necessarily included in the issue, and determined by the judgment.

A claim for damages for *malpractice*, in such a case, is not *new matter*. New matter admits the plaintiff's demand, but such a claim denies its existence altogether.

It is not a *counter-claim*. Strictly speaking, where the plaintiff has no claim, the defendant cannot have a counter-claim.

The two claims, in such a case, cannot co-exist; and a recovery by either party will effectually bar the action of the other party.

A PPEAL from a judgment rendered at a special term, after a trial at the circuit, on exceptions. The facts appear in the opinion of the court.

M. H. Throop, for the plaintiff.

G. A. Hardin, for the defendant.

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MORGAN, J. In this action the plaintiff claims damages of the defendant for the loss of services of his wife, on account of the alleged malpractice of the defendant, who, as surgeon and physician, was employed to set, reduce and cure a broken leg of plaintiff's wife; but by negligence, ignorance and unskillfulness in his profession failed to cure it; and under his treatment it in fact became incurable. In consequence of which the plaintiff was deprived of her services and put to great expense in procuring other professional aid and assistance.

The defendant denied the allegations of the complaint; and answered specially, that the reason why the limb did not heal was through the mere negligence, carelessness and mismanagement of plaintiff's wife. After the issue was thus joined, the defendant sued the plaintiff before a justice of the peace of Little Falls, Herkimer county. The parties duly appeared before the justice and joined issue. The defendant, who was plaintiff before the justice, complained and alleged that Bellinger was indebted to him in the sum of \$100 for medicines and professional services, and *especially for professional services and skill bestowed in attending the wife of Bellinger, and in setting, securing and attending to a fractured limb of Bellinger's wife.* Bellinger's answer before the justice denied each and every allegation of the complaint. It also averred that the services were so unskillfully performed that they were of no value. And Bellinger claimed judgment for costs of suit.

On the trial before the justice, Bellinger informed the justice that *he withdrew his second answer, and all claim and defense founded upon any want of care in Craigie.* Craigie objected to its withdrawal, but the justice overruled the objection. The justice therefore, on proof of Craigie's bill for attendance upon Mrs. Bellinger, allowed for every visit and the price as charged by him. The justice says that *he did not in fact take into consideration the claim for malpractice.* Judgment was rendered for Bellinger for the amount of his bill,

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\$15.50, besides costs of action. The defendant in this action, Dr. Craigue, obtained permission to put in a supplemental answer to the plaintiff's complaint, and to set up the justice's judgment, thus obtained, as a bar to the plaintiff's demand.

The cause was tried before Justice MULLIN, at Herkimer, in May, 1858; and the plaintiff, Bellinger, having given evidence tending to prove a case of *malpractice*, the defendant, under objections from the plaintiff's counsel, was allowed to prove the pleadings, proceedings and judgment before the justice as above detailed. Justice Mullin, however, reserved the question as to the legal effect of these proceedings, and finally overruled the defense; and the defendant went into proof on his part tending to show that it was not his, but Mrs. Bellinger's, fault, that the limb did not get well. The question of negligence was submitted to the jury, and they found a verdict against the defendant and in favor of the plaintiff, for nine hundred dollars damages. Exceptions being taken by the defendant, the question comes up, on appeal to this court, whether the judgment of the justice, at Little Falls, between these same parties, is a bar to the plaintiff's demand in this action.

The plaintiff's counsel makes a point, or rather a suggestion, that the limited jurisdiction of a justice's court will in some way impair or diminish the conclusiveness of his judgments as to those matters within his jurisdiction. He, however, finally admits that it is too late to ask a decision against the conclusiveness of a justice's judgment on this ground. And in this concession, which is doubtless due to the authorities in this country, the counsel must see that it is the duty of this court to give full effect to the maxim, *interest reipublice ut sit finis litium*, by making the judgment of a justice's court final, as to the subject matter thereby determined.

There is also a suggestion in the counsel's argument, that the justice's judgment was fraudulently obtained, and therefore it may be disregarded, or in some way weakened, so as not to conclude the parties in this action. But it would not

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become us to listen to this suggestion, when there is no intimation in the pleadings or evidence, that the judgment was fraudulently obtained.

The question then is narrowed down to the single point, whether the plaintiff's demand in this action was adjudicated before the justice's court. It may be conceded that it was not actually litigated there; for it was finally withdrawn from the consideration of the court; and the justice says that he did not in fact take it into consideration. Still it cannot be denied that the judgment of a competent court is not only conclusive on all questions actually and formally litigated, but as to all questions *within the issue*, whether formally litigated or not. (*LeGuen v. Gouverneur*, 1 *John. Cases*, 492. *Marriott v. Hampton*, 7 *T. R.* 265. *Davis v. Tallcott*, 2 *Kern.* 184. *Jones v. Scriven*, 8 *John. R.* 453. 2 *Smith's Lead. Cas.* 442, (in notes;) and see *Fidler v. Cooper*, 19 *Wend.* 285; *Edwards v. Stewart*, 15 *Barb.* 67.)

In this case, the defense being withdrawn, it cannot be said that it was actually litigated; and if the plaintiff is barred of his action, it is because his demand was *impliedly* and *necessarily* within the issue joined before the justice, and its determination *necessarily* included in the judgment.

A fact *impliedly* averred may be traversed in the same manner as if it was expressly averred. (*Prindle v. Caruthers*, 15 *N. Y. R.* 429. *Haight v. Holley*, 3 *Wend.* 263. *Chambers v. Jones*, 11 *East.* 406.) The general denial of the code doubtless puts all the allegations of the complaint in issue, whether expressed or implied. If the plaintiff's claim is a denial of the defendant's claim before the justice, and *not new matter*, it was within the issue tried before the justice. But if it is new matter, it was not within the issue. The new matter mentioned in § 149 of the code is that which admits and avoids the cause of action set up in the complaint, and constitutes a defense. (*Brazill v. Isham*, 2 *Kern.* 9; and see 3 *Duer*, 685; 12 *How.* 445.) It must be specially pleaded. (*McKyring v. Bull*, 16 *N. Y. Rep.* 297.) The denial of the

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plaintiff's complaint, before the justice, must therefore be held and regarded as putting in issue all the allegations of the complaint, and as controverting all the facts stated or implied therein; but it did not put in issue any *new matter*; and if the second answer constituted new matter, it was not within the issue formed by the second denial. But was it *new matter* of defense? or was it admissible under the general denial? Clearly, if Dr. Craigue had set forth the contract in his complaint, as the law would interpret it, he would have substantially charged "that being a surgeon and physician, he undertook, for a reasonable compensation to be paid to him by Bellinger, to treat his wife's broken limb with a reasonable degree of care and skill." The law implies a promise on the part of the surgeon, that he has ordinary skill, and that he will execute the business entrusted to him with ordinary care and skill. If he fails in this duty, he is guilty of default in his undertaking, and cannot collect the pay for his services, but is liable in damages to the persons who employed him. (1 *Chitty on Cont.* 482, 3.) The contract is *entire*, and *performance* is necessary, to entitle the surgeon to recover any thing. If the complaint had expressed such a contract, and if it had alleged before the justice that the doctor had performed it in all things on his part, a denial of these allegations would have put the question directly in issue. It would not be *new matter*, to deny that the doctor had performed his contract as thus stated in his complaint; and yet it would be a full defense to the action, if Bellinger had succeeded in proving it. The law would not, on the trial, presume that the plaintiff had neglected his duty and made default in his undertaking; for a breach of duty, or negligence, or fraud are not to be presumed. (*Starr v. Peck*, 1 *Hill*, 270.) The burden of proof is therefore cast upon the defendant, to disprove the allegation of performance, in such a complaint. But if he neglects to offer any such proof, the fact of performance is presumed, and necessarily must be, to authorize the doctor to recover for his services. The judgment of the justice in favor

dictum

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of the plaintiff in such a case, would imply performance of the contract on his part. The fact of performance is found, or adjudicated in favor of the doctor; and I think cannot be again disputed, in an action between the same parties.

Now although *new matter* cannot be proved under a general denial, most of the defenses which could have been proved under the old general issue of *non-assumpsit*, such as release, statute of limitations, insolvent discharge, arbitrament, &c., must still be brought forward by the defendant as matters of special defense, or the defendant loses the benefit of them. These defenses will not support an action, but must be used, if at all, to defeat an action. It is, however, different with the defense called a *counter-claim*. That may be used to sustain, as well as to defend, an action. It may co-exist with the plaintiff's claim, and is simply a cross action, to enforce a legal or equitable set-off. It *admits* the plaintiff's demand, but seeks to reduce it, or even extinguish it, by a legal or equitable offset. And I think the defendant always has an election to recoup his damages or wait and bring his suit. It may well be that his damages exceed the plaintiff's demand, and as he cannot split up his claim and use part of it to extinguish the plaintiff's demand, and bring suit for the residue, ~~he ought not to be bound to recoup his damages, in any case. Nor do I think the authorities require it of him. (Reab v. McAlister, 8 Wend. 109. 14 id. 257. 5 Hill, 76.)~~

But where there is *no claim* on the part of the plaintiff there cannot, strictly and logically speaking, be a *counter-claim*. The claim of Bellinger against the defendant in this case does not admit the defendant's claim, but denies its existence, altogether. The two claims cannot coexist. If Bellinger's claim is good, and if judgment had passed in his favor before the suit in the justice's court was disposed of, it would have estopped the defendant from saying that he had performed his contract, and would have barred his action before the justice. This point was decided in the case of *Edwards v. Stewart*, in this court. As estoppels are mutual,

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the converse of the proposition must be held in this case. And I think the point is thus held in *Davis v. Talcott* in the court of appeals. (*See Judge Gardiner's opinion, 2 Kernan, 189.*)

The result is that the judgment must be reversed, and a new trial granted, costs to abide the event.

ALLEN, J. concurred.

MULLIN, J. dissented.

Judgment reversed.

[ONONDAGA GENERAL TERM, July 8, 1860. *Allen, Mullin and Morgan*, Justices.]

BURT vs. DEWEY.

In an action by a purchaser of goods, against the vendor, for a breach of the implied warranty of title, on the ground that the goods belonged to another person at the time of the sale, and that the latter has recovered a judgment against the plaintiff for converting the same, the plaintiff need not prove that he has *paid* such judgment.

Nor is it necessary for him to show that he gave his vendor notice of the suit brought against him by the real owner of the property. His omission to give such notice will only prevent his recovering of the vendor any of the costs of that suit, and will throw the burden upon him of proving, by evidence other than the record of the former suit, that the vendor had no title to the property, at the time he sold it to him.

In an action by a purchaser of goods, against the vendor, for breach of the implied warranty of title, the plaintiff is entitled to recover the price paid by him for the property, with interest.

THE plaintiff brought this action in 1857, to recover the price he paid the defendant for a horse, in 1852. The plaintiff purchased the horse of the defendant in December, 1852, and paid him \$80 therefor. The plaintiff sold the horse, soon after he purchased him, to one Furman. The horse during this time belonged to Joseph Dysart, from whom he had been stolen by some person, within a few months prior

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to December, 1852. Dysart sued the plaintiff before a justice of the peace in Chemung county, in 1856, for converting the horse, and recovered a judgment against the plaintiff, on the 30th day of October in that year, for \$100 damages and \$2.88 costs.

This action was tried at the Chemung circuit in September, 1858, when the plaintiff proved the above facts and was nonsuited. He took an exception to the decision nonsuited him, which was incorporated into the judgment roll. After judgment was entered on the nonsuit against him for costs, he appealed therefrom to the general term.

Robertson & Fassett, for the plaintiff.

Hart & Benn, for the defendant.

By the Court, BALCOM, J. I think the evidence authorizes the conclusion that the defendant had possession of the horse at the time he sold it to the plaintiff; and if he then had possession of it the law implies that he warranted he had a good and valid title to it. (1 *Cowen's Tr.* 2d ed. 318. 1 *John.* 274. 6 *id.* 5. 8 *Cowen*, 272.)

The plaintiff proved that the defendant had no title to the horse at the time he sold it to him. He then showed that the true owner had recovered a judgment against him for \$100 and costs, for converting the horse by a sale of it to one Furman. But he was nonsuited because he did not prove he had paid the judgment against him.

All that the court held in *Vibbard v. Johnson*, (19 *John.* 77,) was that it is not competent for the purchaser of goods to dispute the title of his vendor, unless he has been charged at the suit of another person, who has, after contestation, shown a better title. In *Armstrong v. Percy*, (5 *Wend.* 535,) the court decided that the measure of damages in an action brought for a breach of an implied warranty of title in the sale of a horse, is the price paid, the interest thereon, and the

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costs recovered against the purchaser or his vendee, in case of a suit by the owner *and notice to the vendor*, and that the costs of the defense are not recoverable. In *Livingston v. Bain*, (10 *Wend.* 384,) Nelson, J. said, "I admit, in the case of personal property, the vendee in possession cannot set up a want of title in the vendor, from whom he has received it, until a legal eviction or recovery against him by the lawful owner." The same learned judge said, in *Case v. Hall*, (24 *Wend.* 102,) "Where the vendee relies on the warranty of title, express or implied, there must be a recovery by the real owner before an action can be maintained. This is in the nature of an eviction, and is the only evidence of the breach of the contract, in analogy to the case of covenants real." He further said in the same case: "In case of a breach of warranty, the measure of damages is the purchase money and interest." None of these cases shows that the purchaser must pay the judgment recovered against him by the rightful owner before he can sue his vendor for the price paid for the goods; and I am of the opinion such proof is unnecessary. The amount of the judgment is not, ordinarily, the measure of damages the purchaser is entitled to recover against his vendor. In this case, if the true owner had recovered a judgment for only \$50, instead of \$100, against the plaintiff, for converting the horse, the plaintiff would still be entitled to recover of the defendant the price he paid him for the horse, with interest.

I also think it was not necessary for the plaintiff to show he gave the defendant notice of the suit brought against him by the real owner of the horse. He averred in his complaint that the defendant was out of the state, when that suit was brought, and that he was unable to ascertain where he was, so that he could give him notice thereof. He did not prove this averment; but there must be many cases where it is impossible to serve such a notice. The omission of the plaintiff to give the defendant notice of that suit, and an opportunity to defend it, prevents him recovering of the defendant any of the costs thereof; and throws the burden upon the plaintiff of

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proving in this action, by evidence other than the record of the former suit, that the defendant had no title to the horse at the time he sold it to him. I think this is the only effect the want of notice to the defendant should have in the case.

It is settled in Kentucky that an implied warranty of title to goods is not of the character which requires a recovery of the goods by the right owner before an action can be maintained by the purchaser; but is in the nature of an undertaking on the part of the seller that the commodity he sells is his own; and that in an action upon such an undertaking it is a sufficient breach to allege that the property belongs to some other. (*Payne v. Rodden*, 4 *Bibb*, 304. *Scott v. Scott's Adm'rs*, 2 *A. K. Marsh.* 217. *Chancellor v. Wiggins*, 4 *B. Monroe*, 201.)

Story, in his treatise on sales, adopts the rule established by the decisions in this state, and says the purchaser of goods "cannot, where the contract is executed, bring an action on the warranty of title, until such warranty has been broken by an actual eviction by the true owner, or at least by suit or adverse claim brought against him, in which his title is assailed." (*Story on Sales*, § 209, 2d ed.)

My conclusion in this case is that the evidence entitled the plaintiff to recover the price he paid the defendant for the horse, with interest thereon. The judgment against him should therefore be reversed and a new trial granted, costs to abide the event.

Decision accordingly.

[BROOME GENERAL TERM, July 10, 1860. *Mason, Balcom, Campbell and Parker*, Justices.]

**CLEVELAND, *appellant*, vs. WHITON, executor, &c. and others,
respondents.**

When a surrogate has, upon the application of a judgment creditor of a decedent, ascertained and determined that the plaintiff's judgment is a valid and legal claim, or a subsisting demand, against the estate of the deceased, and is justly due and owing therefrom, his duty in respect to such judgment is ended, except to enter the same in a book of his proceedings.

He cannot go further, and ascertain that the judgment creditor owes the devisees of the real estate a certain amount of rent therefor, and then exercise the prerogative of a judge in equity, and apply the same upon the judgment. The legislature has given him no such power.

APPEAL from an order made by the county judge of Tompkins county, acting as surrogate, allowing certain rent as a set-off or counter-claim against a judgment, owned by the appellant, which was recovered against John L. Whiton, executor of the last will of Elias Fraser, deceased. The order was made in proceedings instituted before the county judge, acting as surrogate, by the appellant, to compel the sale of the real estate of the deceased, by his executor, for the purpose of paying his debts.

The judgment was recovered by Joseph Proude, in the supreme court, upon two promissory notes made by the testator, and it was docketed on the 9th day of December, 1857, for \$403.95. The real estate, which the appellant claimed the county judge, acting as surrogate, should authorize the executor to sell, was leased by the testator to the appellant and others, and the rent set off or applied upon the judgment, became due subsequent to the death of the testator, and the appellant was separately liable for the payment thereof. The real estate was devised by the testator to the respondents, Milton B. Fraser, Harvey Fraser and Westall Fraser; but the will of the testator authorized the executor to sell and convey the same, and divide the proceeds thereof in equal proportions among the said devisees. The appellant purchased the judgment and took an assignment thereof before he instituted the proceedings to compel a sale of the real estate.

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The executor and devisees prayed that the county judge, acting as surrogate, would apply the said rent, that had become due on the lease subsequent to the death of the testator, upon said judgment, and he so applied the same ; and after it was so applied there was due upon the judgment the sum of only \$200.74.

The appellant objected to the introduction of said lease before the county judge, acting as surrogate, on the following grounds : " 1st. The creditor denies that there is any thing due from him on the said lease. 2d. That the rent claimed as being due upon said lease has accrued since the death of the testator. The same belongs to the devisees of the real estate, and is a personal demand which they have against the lessees named in the said lease. 3d. The creditor further objects to the surrogate entertaining the question whether any rent is due upon the lease, that being a personal demand and claim between the devisees and the creditor. 4th. That the claim for rent being a personal claim existing in favor of the devisees, against the lessees, cannot be set off against the demand of the creditor against the estate. 5th. That said claim for rent does not belong to the executor, and is not assets in his hands. 6th. The only offsets that can be allowed in this action being such as could or might have been offset by the executor in the action against him."

The objections were overruled ; the lease was admitted as evidence, and the appellant excepted. The respondents then admitted that certain payments of rent had been made on the lease. The county judge, acting as surrogate, then ascertained by computation the amount that was due the devisees upon the lease, and applied the same upon the judgment. The appellant thereupon brought this appeal from the order of the county judge, acting as surrogate, fixing the amount due on the judgment as aforesaid.

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subsisting demand, against the estate of the deceased, and was "justly due and owing" therefrom, notwithstanding the rent that was due from the appellant to the devisees of the deceased. When the surrogate ascertained these facts, his duty in regard to the appellant's judgment was ended, except to enter it in a book of his proceedings. He could not go further, and ascertain that the appellant owed the devisees of the real estate a certain amount of rent therefor, and then exercise the prerogative of a judge in equity, and apply the same upon the judgment. He could not do this, for the reason that the legislature has not given him any such power.

It follows that the county judge, acting as surrogate, had not jurisdiction, in equity, to make an order that the demand which the devisees had against the appellant for rent be set off against or applied upon his judgment, that had been recovered against the executor. The order making such set-off or application was therefore erroneous, and should be reversed with costs.

Decision accordingly.

[BROOME GENERAL TERM, July 10, 1860. *Mason, Balcom, Campbell and Parker*, Justices.]



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DAY vs. THE NEW YORK CENTRAL RAIL ROAD COMPANY.

An agreement was made between the plaintiff and the defendant, a rail road company, by which the former was to convey to the latter a strip of land adjoining the rail road, and by which he agreed to erect upon his own lands, cattle yards, and pens for stock, &c. for shipping and transferring the cattle, &c. to and from the cars; to provide for feeding the stock; and to build a house to entertain the drovers &c. in charge of the stock. In consideration of which the defendant agreed to construct a rail road track, on its own land, alongside of the plaintiff's land, and to run its stock trains of cars over said track, and stop at certain places, and deliver to the plaintiff, upon his land, all the stock that was to be transported eastward, and to receive and load them there; to the end that the plaintiff might enjoy the profits to arise from keeping and feeding the stock. It appeared that the

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business contemplated by the contract could not be done without connecting the lands of the plaintiff with those of the defendant, by means of a platform or bridge resting partly upon the land of each party.

- Held*, 1. That the contract, if valid, in effect created an easement or servitude which was to be binding upon the real property of the defendant, as the servient tenement, for the benefit of the plaintiff and his land, and those who should succeed the plaintiff in his real estate.
2. That the negative easement acquired by the plaintiff in the lands of the defendant, by virtue of the agreement, was an incorporeal hereditament, the right or title to which could only pass by grant, or deed under seal, or be acquired by prescription; and that the contract in this case being by parol was void.
3. That the agreement, being oral, was void by the statute of frauds, because, from its nature and terms it was not to be performed within one year, but was to continue in operation, as a permanent arrangement, during the existence of the corporation.

THIS was an appeal from an order made at a special term, denying a motion for a new trial; also an appeal from the judgment; the parties having agreed that both appeals might be heard together.

G. D. Lamont, for the plaintiff.

John Ganson, for the defendant.

By the Court, MARVIN, J. The plaintiff claims that in May, 1855, he entered into an agreement with the defendant, by which he was to convey to the defendant a strip of land upon his premises, some 1774 feet in length and some 41 feet in width, and lying alongside of the rail road lands of the defendant; that the plaintiff was to erect upon his own lands, adjoining the strip so to be conveyed, cattle yards, and pens for stock, swine, sheep, &c. that might be wanted to accommodate the shipping and transferring to and from the cars, the cattle &c., and to provide for feeding the stock, and would build a house prepared to entertain the drovers and men in charge of the stock; and that the defendant, in consideration thereof, was to bring its cattle business upon his farm and to receive and load the cattle &c. there.

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It is alleged and claimed that the plaintiff performed the agreement on his part; that the defendant constructed and laid down tracks on the land so conveyed, and for a time performed the agreement, but in 1856 broke the agreement by neglecting and refusing to bring its cattle business upon the plaintiff's farm, and to receive and load cattle &c. there, &c.; and that the plaintiff lost the profits to arise from feeding and keeping the stock. The evidence to prove the agreement consisted in, first, a written instrument executed by the plaintiff only, dated May 24th, 1855, by which the plaintiff agreed to sell and convey the land, and "to build all the cattle yards and pens for stock, swine, sheep, &c. that may be wanted to accommodate the shipping of the same from my land, adjoining the land hereby agreed to be sold, upon the said rail road company's cars;" second, a deed executed by the plaintiff and wife, dated May 24th, 1855, conveying the land to the defendant. "And also the right of ingress and egress to and from the land hereby conveyed, over and across the land of the parties of the first part to the public highway northwardly, in such place or places as may be convenient or necessary to load or unload cattle, horses, sheep, swine, or any other animal from said highway, upon or off of the cars, on the said rail road tracks of the said party of the second part, built on the lands hereby conveyed." It also contains a clause by which the plaintiff "agrees to build and keep in repair all the cattle yards and pens for stock, swine, sheep, &c. that may be wanted to accommodate shipping or transferring to or from the cars on his land adjoining the land hereby sold and conveyed, free from any expense to said rail road company." These two instruments constituted the only *written* evidence of the agreement between the parties. The evidence of what the defendant was to do was by parol, unless it is to be inferred that it was to do something from its acceptance of the contract and deed to be found in those instruments. The plaintiff gave parol evidence, under objection and exception, tending to prove the contract as claimed by him.

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The defendant's counsel makes the point, that the agreement upon which the plaintiff sought to recover, being oral, was void; that it related to an interest in land and power over and concerning land. The statute is, "no estate, or interest in lands, other than leases for a term not exceeding one year, nor any trust, or power over or concerning lands, or in any manner relating thereto," shall be created, &c. unless by act or operation of law, or by a deed or conveyance in writing, &c. (2 R. S. 134, § 6.)

What was the nature of the agreement on the part of the defendant? Let us analyze and comprehend the agreement. The defendant was to construct a rail road track on its own land, close alongside of the plaintiff's land, and was to run its stock train of cars over this track, and stop at certain places, and deliver to the plaintiff, upon his land, all the stock that was to be transported eastward, and was to receive and load them there, to the end that the plaintiff might enjoy the profits to arise from keeping and feeding the stock. Suppose such agreement valid and binding; would it create any *interest* in, or *trust* or *power* over or concerning the rail road? It could not be performed without using the rail road, and that too for the benefit of the plaintiff's land. Would not such agreement attach to and affect the rail road? Suppose the defendant had sold its road, to any other corporation, being authorized so to do; could not the plaintiff, if the contract was valid, insist that the vendee should perform it? The plaintiff's counsel argues that the contract was personal only, and that it had no effect on the real estate of the defendant.

It would not be claimed that this contract could by possibility be performed without using the defendant's road, and that too in a particular manner. It would not satisfy the contract to stop the cars at a distance from the plaintiff's land, unload the cattle, and drive them to the plaintiff's pens and yards to be kept and fed, and then drive them back to the defendant's cars, even if the cattle drovers would consent. No, the right of the plaintiff is that the cattle shall be brought

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to his land in the cars, on the track of the defendant's road, and he has a right to receive them from the cars, and that the defendant should receive or load them there upon their cars, when they are to be transported eastward. The plaintiff tells us how this was done. "The defendant built a platform and shutes to unload and load cattle, the platform was as high as the floor of the cars, to receive the cattle, and about 250 feet long and 9 feet wide, located on the land for track, and partly on the plaintiff's land, about 10 feet." Thus it seems that the business contemplated by the contract could not be done without uniting the lands of the plaintiff and defendant. The platform rested partly upon the plaintiff's land and partly upon the defendant's land, and constituted the bridge or passage way on which the cattle were to go from the premises of the defendant to the premises of the plaintiff, and so back again. Would not this give the plaintiff an interest in the defendant's land, and the defendant an interest in the plaintiff's land? How does this differ in principle from erecting a dam upon the land of another? (*Mumford v. Whitney*, 15 Wend. 380.) But this case goes much further. If the contract is valid, it in effect created an easement or servitude, which was to be binding upon the real property of the defendant, as the servient tenement, for the benefit of the plaintiff and his land, and those who should succeed the plaintiff in his real estate. The case in principle cannot be distinguished from *Pitkin v. Long Island Rail Road Co.*, (2 Barb. Ch. Rep. 222.) This case is more marked than the case cited. Pitkin's land did not adjoin the lands of the rail road. His land consisted of a race-course; a lane extended from the rail road track to the course, and the agreement, as claimed, was that the cars should stop at the lane. It was held that such an agreement was, in substance, the grant of an easement or servitude, and that it could not be made by parol, under the provisions of the common law and the statute of frauds. Adopt the argument of the chancellor in that case, and apply it to this case, and it would be, that the plaintiff has no legal interest in having the

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cars of the defendant run alongside of his land and stop there for the purpose of unloading cattle upon his land, and then receiving them upon its cars from the plaintiff's land permanently, except as it may benefit him as the owner of his land. Such right is a negative easement in the property of the defendant, that is, the power to restrict the defendant as the owner of the servient tenement, in the exercise of general and natural rights of property, and to compel the company to use it in a particular way, by keeping or permitting certain erections thereon, and stopping with its trains at a particular place for the plaintiff's use and benefit, as the owner of the adjoining land, as the dominant tenement. It is therefore an incorporeal hereditament, the right or title to which can only pass by grant, or deed under seal, or be acquired by prescription. (*See 3 Kent's Com. 434.*)

If the right claimed had been created by grant, or deed under seal, it would have been a real right, a charge on the defendant's land for the benefit of the plaintiff as the owner of his land, and such right would have descended to his heirs, or passed by a grant of his land with the appurtenances. It would have been a charge upon the defendant's estate, for the benefit of the plaintiff's estate. (*3 Kent, 443.*)

I have looked carefully into the instruments executed by the plaintiff. They contain no conditions, nor do they contain any thing from which a grant of the right claimed can be implied. Nor were the circumstances such as to create the right by implication. They contain a covenant on the part of the plaintiff to build all the cattle guards and pens that may be wanted to accommodate the shipping of the stock &c. from the plaintiff's land adjoining the land of the defendant. In the deed the plaintiff grants the right of ingress and egress to and from the land conveyed, over and across the land of the plaintiff, to the public highway northwardly, in such place or places as may be convenient or necessary to load or unload cattle &c. from said highway upon or off of the cars on the rail road track of the defendant, built on the land conveyed. The

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plaintiff also covenants to build and keep in repair all the cattle yards and pens for stock &c. that may be wanted to accommodate shipping and transferring to and from the cars on his land adjoining the land thereby sold and conveyed, free from any expense to the defendant.

The defendant does not agree to do any thing ; nor can any covenant on its part be implied, by any fair construction of the instrument. The claim is that the defendant was to bring all its cattle business to the plaintiff. All the covenants on the part of the plaintiff, and the grant, are entirely consistent with the right on the part of the defendant to make the same arrangements with other persons, or to establish cattle yards and pens of its own. Besides, there can be no implied covenants in a conveyance of real estate. (1 R. S. 738, § 140.)

The defendant's counsel also makes the point, that if the agreement was a mere personal contract, being oral, it was void, because from its nature and terms it was not to be performed within one year. In other words, it was to continue in operation during more than one year, viz. during the existence of the corporation. I think this point is well taken. The chancellor so held in *Pitkin v. The Long Island Rail Road Co.*, (*supra*.) By the statute an oral agreement is void "that by its terms is not to be performed within one year from the making thereof." The argument of the plaintiff's counsel is, that it was not provided by the terms of the agreement that it should not be performed within one year, and that therefore the agreement does not come within the statute, and he cites several cases: *McLees v. Hale*, (10 Wend, 426,) in which a large number of cases are collected ; also *Plimpton v. Curtiss*, (15 Wend. 336 ;) *Lyon v. King*, (11 Metc. 411 ;) *Peters v. Westborough*, 19 Pick. 364.)

It will be seen by consulting these cases, that the contract was of such a nature that it might be performed within the year, or it might come to an end and cease to be operative. Some of the contracts related to supporting a person for a certain number of years, or until the person should attain a cer-

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tain age. Such contracts, it was held, were not void, because they rested upon a contingency which might happen within the year, as the death of the person to be supported. Some of the cases say, it does not appear but that the contract was to be performed within a year. If the thing may be performed within a year it is not within the statute. If, however, it appear from the fair construction of the agreement, that it is not to be performed within the year, then a note in writing is necessary. (15 *Wend.* 336.)

Treating the agreement as personal and executory, it was a permanent arrangement, and it was contemplated it should continue during the existence of the corporation. The plaintiff's covenant to construct and maintain yards and pens &c. was perpetual, and by the agreement the defendant was to take its cattle business to him. True no time was specified, but no reasonable construction can be given to it other than that it was to continue permanently, as long as the corporation existed. It is clear that what the defendant undertook to do, could not be all performed in one year. The learned judge held, in this case, that the contract was continuous, and that the plaintiff could only recover for the damages sustained up to the time of commencing the action. It seems to me, also, that the contingency applicable to the life of natural persons, ought not to be applied to this case. To bring such contingency into the case and make it available in avoiding the statute, we must suppose that the corporation might be entirely dissolved within a year, leaving no successor, as receiver or otherwise, upon whom the liabilities of the corporation for its contracts might devolve. We cannot with any reason resort to such a contingency. If the corporation should become insolvent, and proceedings to dissolve should be instituted, the law has made ample provisions for its liabilities under its contracts.

Chancellor Walworth, in *Pitkin v. The Long Island Rail Road Co.* did not hesitate to declare the executory agreement in that case, as a permanent arrangement, void, because, in

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his language, "from the nature and terms of the agreement it was not to be performed by the company within one year from the making thereof." The cases cannot, in principle, be distinguished. The statute, as the counsel earnestly claimed, reads, "Every agreement that by *its terms* is not to be performed," &c. If an agreement is such that from its nature it cannot be performed within one year, and must be so construed, then it is within the contemplation and meaning of the statute. The terms of the agreement are what the agreement *necessarily* is.

It is not necessary, probably, to say that a parol agreement which is not to be wholly performed within the year is void. This is so. (*Broadwell v. Getman*, 2 Denio, 37.)

In my opinion the two positions of the defendant thus noticed, are fatal to the plaintiff's right to recover damages in this action, and the plaintiff should have been nonsuited.

The judgment must be reversed.

[ERIE GENERAL TERM, May 14, 1860. *Greene, Marvin, Davis and Grover*, Justices.]

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A common carrier of passengers may, by agreement, provide that a passage shall be made within a time specified, and in one continuous trip.

Thus, where the plaintiff paid for a passage from New York to Buffalo by the Hudson River and New York Central Rail Roads, and received a passage ticket, which specified that it was to be used within three days, and was good for a continuous trip only; it was *held* that the ticket was to be regarded as the evidence of a contract which the rail road companies were authorized to make; and that it conferred upon the plaintiff a right of passage, to be exercised within three days, and during a continuous trip, only.

And the plaintiff having proceeded as far as Albany, upon the rail road, and then left the cars and remained there six or seven days, it was further *held* that upon resuming his journey, after the expiration of the time specified in the ticket, he was liable to pay an additional fare to the rail road company; and that upon his refusal to pay, the conductor was justified in removing him from the cars.

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MOTION for a new trial, upon exceptions first heard at general term. The action was to recover damages for an assault, and for ejecting the plaintiff from the cars of the New York Central Rail Road Company. The defendant was a conductor on the cars. The plaintiff, August 12th, 1858, purchased of the Hudson River Rail Road Company, at its depot in New York city, a ticket for a passage to Buffalo. He inquired what the fare to Buffalo was, and was told \$5.00, which he paid and received a ticket reading thus: "Good for one seat in first class car from New York to Buffalo by Hudson River and New York Central Rail Roads; to be used within three days from date; good for a continuons trip only; issued by the Hudson River R. R. Co." Signed "C. H. Kendrick." On the back was printed "Hudson River R. R. Ticket Office, August 12, 1858." The plaintiff left the city immediately, and rode to Albany, where he remained until the 18th or 19th day of August, when he took the cars of the Central rail road and rode to a place west of Syracuse. The defendant came into the cars, as conductor, at Syracuse, and after calling upon the passengers for tickets or fare, the plaintiff exhibited the ticket, and the conductor refused it and told him it had expired and was not good, and that the plaintiff must pay fare. The plaintiff refused, and the defendant removed him from the cars, using no unnecessary force, and acting under instructions from the New York Central Rail Road Company. After the plaintiff was thus removed he returned to the car, paid fare and continued his journey. The reduction of fare to \$5.00 was owing to the competition then existing between the New York Central Road Company and other competing lines. The usual fare from New York to Buffalo was about \$9.50. These facts were stated by the plaintiff.

The plaintiff rested, and the court, upon motion of the defendant, granted a nonsuit, the plaintiff claiming the right to submit the case to the jury. The plaintiff duly excepted.

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Talbert & Phelps, for the plaintiff, cited *Quimby v. Vanderbilt*, (17 N. Y. Rep. 306.)

Cox & Avery, for the defendant, cited the *Statute*, (*Sess. Laws* 1850, p. 231, § 35 ;) also *Hibbard v. New York and Erie Rail Road*, (15 N. Y. Rep. 458, 9.)

By the Court, MARVIN, J. At the circuit, I was of the opinion that the case was to be controlled by the contract between the plaintiff and the rail road companies, and that the contract was, simply that the plaintiff, for the consideration of \$5, should have a seat and be conveyed in the first class cars from New York to Buffalo by the Hudson river and the New York Central Rail Roads, in case he availed himself of the contract within three days, and made the journey by a continuous trip. It was assumed that the agent selling the ticket had authority to bind the Hudson river and New York Central roads, and the question was made to turn upon the contract. The ticket was produced and given in evidence by the plaintiff, and it furnished the evidence of the contract. It was the only evidence furnished by the plaintiff to the defendant of the right of the former to remain in the cars. The defendant recognized the contract, and claimed that it gave to the plaintiff no right to a seat and passage in the cars, at that time. If the ticket is to be regarded as the evidence of the contract, and the contract was not illegal, then I confess that I am unable to take any other view than that taken at the circuit. The contract conferred upon the plaintiff a right of passage, to be exercised within three days, and during a continuous trip, only.

The plaintiff took a seat in the cars and was carried to Albany. Instead of proceeding on to Buffalo in the cars of the New York Central Rail Road Company, he left the cars, remained in Albany six or seven days, and then took the cars and claimed the right, under the contract, to be carried to Buffalo. He certainly had no such right under the contract,

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as I construe it. Had the rail roads the right to make such contract? Was the contract legal? I confess I am not able to see any reason why they had not the right to make such contract, and why it was not legal. They were common carriers of passengers, and had a right to make any special contract not unreasonable and illegal. May not common carriers of passengers say, to-day, or this week, we will carry you, a passenger, over our route, for a sum specified, though to-morrow, or next week, our price may be double the sum we will now accept? If this right is taken away from rail road companies, or common carriers, what power will they have to protect themselves against overloading? It is claimed that having once received the fare established at any given time, for a passage from one place to another, the person paying the fare will be entitled to the passage at any future time, whatever may have been the terms of the contract, as to the time within which the passage should be made. Establish this as a principle, and the right of passage may be claimed by such numbers upon a particular day or occasion, as to render it impossible for the carrier to perform his contract. The contract for passage may be made at a time when the fare, by the stage, or cars, is very low, and its execution be claimed at a future time when the reasonable fare is much higher; or the tickets may be purchased, as in this case, when competing roads have reduced temporarily the fare, and the passage may be claimed weeks or months after the fare has been greatly increased. In short I know of no reason why the carrier may not, by agreement, provide that the passage shall be made within a time specified and in one continuous trip. As it is the duty of a common carrier to carry the passenger, the terms of the contract as to the time and the trip should be reasonable.

In *Cheney v. Boston and Maine Rail Road Company*, (11 Met. 121,) the plaintiff purchased a ticket for a passage from Dunham to Boston. It was a rule of the defendant, that a passenger should go through in the same train of cars. The

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plaintiff, after taking his seat, was so informed, and remonstrated. He stopped at an intermediate place, and went aboard of the next train and was required to pay fare again. The action was for money had and received, and for breach of contract. The court held that the plaintiff could not recover. This case is, in principle, in point. (*See also Pierce on Am. Rail Road Law*, 491.

If I am right as to what the contract was, and that it was not illegal, then the plaintiff was not rightfully in the car after refusing to pay fare, and the conductor was right in removing him. (*Sess. Laws 1850, p. 231, § 35.*) I have examined *Quimby v. Vanderbilt*, (17 *N. Y. Rep.* 306,) cited by the plaintiff's counsel, and the effect here given to the ticket as evidence of the contract is not in conflict with the opinion in that case.

The motion for a new trial must be denied.

[ERIE GENERAL TERM, May 14, 1860. *Marvin, Davis and Grover, Justices.*]

LESLIE vs. MARSHALL and others.

A testator, by his will, devised to his wife, for life, certain real estate. He made other devises, and then devised and bequeathed one third part of the rest, residue, remainder and reversion of his estate, real and personal, to M., the defendant, and to the heirs of her body forever; and in case of her death without issue then living, he devised and bequeathed her said portion, to be divided in equal parts, to the Trustees of the Theological Seminary of Auburn, and to the Trustees of the Buffalo Orphan Asylum, in fee forever, for the uses and purposes contemplated by their respective charters. He then devised and bequeathed to C. and the heirs of his body, forever, another third. And in case of C.'s death without issue then living, the testator devised and bequeathed his said portion, to be divided in equal parts, to the Trustees of the Theological Seminary, and to the Trustees of the said Orphan Asylum, in fee, forever, for the like uses and purposes. The widow died in 1855, and C. died in 1857 without issue then living. The Trustees of the Theological Seminary claimed, under the will, one sixth of the rest,

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residue, remainder and reversion of the estate, and the plaintiff, who was a sister of C., claimed it as heir at law of C. At the death of the testator the Theological Seminary was not authorized, by its charter, or by statute, to take real estate by devise, but it had capacity to do so at the time of the death of C.

- Held*, 1. That the estate attempted to be devised to the Theological Seminary was not an executory devise, but was a contingent remainder, and would have been such at common law.
2. That inasmuch as the Theological Seminary had no power to take, at the time of the testator's death, and the testator did not contemplate that any additional capacity should be conferred upon it, to enable it to take such remainder, the devise to the Trustees of the Theological Seminary was void.
3. That the Trustees of the Theological Seminary had no title to, or interest in, the real estate of the testator; but that the plaintiff was seised in fee, as the heir of C., of the one half of the undivided third devised to C.
- All the contingencies upon which an estate, created by will, is to depend, must be contained in the will; and the courts cannot change the estate, by incorporating any other contingency or condition. Per MARVIN, J.

APPEAL from a judgment in an action for the partition of a real property. Bela D. Coe made and published his last will and testament, and died in November, 1852, leaving a widow him surviving. He devised to his wife, for and during her natural life, certain real estate. He made other devises, and then devised and bequeathed one third part of the rest, residue, remainder and reversion of his estate, real and personal, to his wife's sister, Mellicent D. Marshall, and to the heirs of her body forever, and in case of her death without issue, then living, he devised and bequeathed her said portion, to be divided in equal parts, to "The Trustees of the Theological Seminary of Auburn in the State of New York," and to the trustees of the Buffalo Orphan Asylum, in fee forever, for the uses and purposes contemplated by their respective charters.

He then devised and bequeathed to his nephew Edward B. Coe and the heirs of his body, forever, another third. And in case of his death without issue then living, he devised and bequeathed his said portion, to be divided in equal parts, to the Trustees of the Theological Seminary, and to the Trustees of the said Orphan Asylum, in fee, forever, for the like

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uses and purposes. Mrs. Coe died in April, 1855. Edward B. Coe died, as the case finds, September 18th, 1857, without issue then living. The "Trustees of the Auburn Theological Seminary" claimed under the will, one sixth of the "rest, residue, remainder and reversion of the estate;" and the plaintiff, who is a sister of Edward B. Coe, claimed it as heir at law of Edward. The decision of the special term was in favor of the claim of the seminary, from which the plaintiff appealed to the general term.

Cox, for the plaintiff.

John Porter, for the Theological Seminary.

Geo. Wadsworth, for the Buffalo Orphan Asylum.

By the Court, MARVIN, J. The question in this case is, whether the "Trustees of the Theological Seminary of Auburn, in the State of New York," had capacity to take by devise, the remainder, under the will. There is no ambiguity in the will; no construction is called for. The intention of the testator is entirely clear. It was his intention that the Theological Seminary, upon the happening of the contingency specified in the will, should take the equal one half of the one third devised to Edward B. Coe.

The Theological Seminary was incorporated in 1820. It was not expressly authorized by its charter, or by statute, to take real estate by devise. By the statute of wills and testaments, (2 R. S. 57, § 3,) "No devise of real estate to a corporation shall be valid unless such corporation be expressly authorized by its charter, or by statute, to take by devise." (See *Theological Seminary of Auburn v. Childs*, 4 Paige, 419.)

We are referred to *Sess. Laws of 1840, ch. 318*, and *Sess. Laws of 1841, ch. 261*, and it is argued that by these statutes the seminary was authorized to take title to real estate by

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devise. By the first of these acts, real and personal property may be granted and conveyed to any incorporated college or other literary incorporated institution in this state, to be held in trust for certain specified purposes: 1st. To establish and maintain an observatory. 2d. To found and maintain professorships and scholarships. 3d. To provide and keep in repair a place for the burial of the dead. 4th. For any other specific purposes comprehended in the general objects authorized by their respective charters. By the latter act devises of real estate in trust, for the purposes for which trusts are authorized under the act of 1840, are authorized.

In the present case the devise was not in trust for any of the purposes specified in the act of 1840. In my opinion, without discussing the question, these statutes do not aid the defendant.

This brings us to the act of March, 1857, amending the act incorporating the Theological Seminary, and authorizing a devise of real estate to the institution, to be held in trust for the uses and purposes of the act amended, with a limitation not necessary to be noticed here. Thus it will be seen that at the time Bela D. Coe died, the defendant, a corporation, was not authorized by its charter or by statute to take real estate by devise. It was so authorized at the time Edward B. Coe died, and the question is, did this corporation take the remainder?

It is said by the defendants' counsel, that the devise in question, by the common law, was an *executory devise*, and that under our revised statutes it is denominated a remainder. It is then conceded that when, in an *executory devise*, the commencement of the estate devised is not expressly deferred to a future period, the devise must be to a person capable of taking at the death of the testator; but, it is insisted that when a future time is mentioned when the estate is to commence, the devise is good as an *executory devise*, if, when the time arrives, the devisee is capable of taking; and it is claim-

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ed that such is the character of the present case. Some authorities are cited, which will be hereafter noticed.

At present it may be serviceable to ascertain the nature of the estate, according to the statute "Of the creation and division of estates."

A future estate is an estate limited to commence in possession at a future day, either without the intervention of a precedent estate, or on the determination, by lapse of time or otherwise, of a precedent estate created at the same time. When a future estate is dependent on a precedent estate, it may be termed a remainder, and may be created and transferred by that name. Future estates are either vested or contingent. They are vested when there is a person in being who would have an immediate right to the possession of the lands, upon the ceasing of the intermediate or precedent estate. They are contingent while the person to whom, or the event upon which they are limited to take effect, remains uncertain. (1 R. S. 723, §§ 10, 11, 13.) Expectant estates are descendible, devisable and alienable in the same manner as estates in possession. (*Id.* 725, § 35.) When an expectant estate is created by devise, the death of the testator shall be deemed the time of the creation of the estate. (§ 42.) It should have been previously noticed, that estates in expectancy are divided into estates commencing at a future day, and reversions.

In the case we are considering the estate was in expectancy, to commence at a future day, depending upon a precedent estate. It was contingent, as the event upon which it was to take effect remained uncertain, viz. the death of Edward B. Coe, without issue then living. It was descendible, devisable and alienable in the same manner as estates in possession. It was *created* at the time the testator died. Such, clearly, would have been the estate if the devisee had had capacity, by its charter or by statute, to take the estate devised. But the devisee, the "Seminary," had no such capacity. It existed as a corporation, but without the capacity to take real estate by devise. If the estate now claimed ever had an existence,

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it was created at the death of the testator. It does not follow from this that the devise of an expectant, contingent estate, will be void unless the devisee is in existence and capable of taking the estate at the death of the testator. The contingency upon which the estate is made to depend, may not happen until long after the death of the testator. But the particular contingency must be specified in the will, and if it is such as may happen and does not violate law, then upon its happening, the estate will vest.

In the case under consideration, the devise to the corporation was, upon the contingency of the death of Edward B. Coe without issue then living. It was not made upon the contingency that the "Trustees of the Theological Seminary at Auburn, in the state of New York," should acquire capacity to take real estate by devise, or this particular estate. And herein is an important difference between this case and *Inglis v. The Trustees of the Sailor's Snug Harbor*, (3 Pet. 99.) In that case the testator died in 1801. The devise was to the chancellor of the state of New York and several others, officially named, and their respective successors in office, upon certain trusts specified. The testator declared it to be his last will and devise, in case what he had specified could not be legally done according to his intention, by such trustees, without an act of the legislature, that the trustees should, as soon as possible, apply for an act of the legislature to incorporate them for the purposes specified. The trustees did apply for an act of incorporation, which was granted, declaring such trustees and their successors a corporation, capable in law of holding and disposing of the estate devised, according to the intention of the will, and declaring the same to be vested in them and their successors in office, for the purposes expressed in the will. It was held, rejecting the mode first pointed out for carrying the intention of the testator into effect, that the devise was valid as an executory devise to a corporation *to be created* by the legislature, to be composed of the several officers designated in the will as trustees to take the estate and

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execute the trust. (*Id.* pp. 114, 115.) "It is," says Justice Thompson, "a devise to take effect upon condition that the legislature shall pass a law incorporating the trustees named in the will." "Every executory devise is upon some condition or contingency, and takes effect only upon the happening of such contingency; as in the case put, of a devise to a feme sole *upon her marriage*, the devise depends upon the condition of her afterwards marrying."

Would the devise in the present case to the defendant have been regarded, at common law, as an executory devise? I think not. I think it would be classed as a contingent remainder, which is defined by Mr. Fearné (*Contingent Remainders*, 4,) to be a remainder limited so as to depend on an event or condition which may never happen or be performed, or which may not happen or be performed till after the determination of the preceding estate. He divides them into four sorts; 1st. When the remainder depends entirely on a contingent determination of the preceding estate. It is not necessary to notice the second and third. The 4th is when the person to whom the remainder is limited is not yet ascertained, or not yet in being. (1 *Powell on Dev.* 206.) The case we are considering comes clearly within this definition. The remainder was to depend entirely upon the contingent determination of the preceding estate of Edward B. Coe. It is not a case where the person to whom the remainder was limited, was not ascertained or not in being. The devisee was known; it was in being. It was a corporation, but without capacity to take real estate by devise.

"An executory devise is a limitation by will of a future estate or interest in land, which cannot, consistently with the rules of law, take effect as a remainder; for nothing has been better settled than this, (and indeed it has been remarked as a rule without exception,) that where a devise is capable, according to the state of the object at the death of the testator, of taking effect as a remainder, it shall not be construed to be an executory devise." (2 *Powell on Dev.* 237.) The author

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in this place adds, that a remainder may be described to be a limitation immediately expectant on the natural determination of a particular estate of freehold limited by the same instrument. A devise to the children of A., who has no child at the death of the testator, or to the heirs of the body of B., a person then living, is executory. Here A., having no children when the testator died, and as there could be no heirs of B. while he was living, the objects of the testator's bounty did not exist at the time of his death. A devise is executory when made to a person, whether in being or not, to take effect at a given period after the death of the testator, or at the death of a stranger. (*Id.* 238, and cases cited.) If, however, it is to take effect upon the death of the person having the immediate precedent estate, it will not be an executory devise, but a remainder.

In the case we are considering, no future time, after the death of the testator, was mentioned, when the estate should commence; nor was it made to commence at the death of a stranger; nor was it postponed to a day beyond the death of Edward. On the contrary, it was to commence upon the death of Edward, (in whom the estate was to vest after the termination of Mrs. Coe's life estate,) without issue then living. In my opinion, at common law, such an estate would be a contingent remainder.

The testator did not contemplate that the Theological Seminary should do any thing after his death, or that any thing should happen to enable it to take real estate by devise. He probably supposed it had the capacity to take, and he made no provision for a contingency of incapacity, as in the case in 3 *Peters*, (*supra*.) Thus a devise to the first son of A. *when he shall have one*, is a good future executory devise. (1 *Salk.* 226, 229.) In *Bate v. Norton*, (*T. Raym.* 82,) the devise was to one of a class of daughters, who should marry with a Norton, within fifteen years. In *Gore v. Gore*, (2 *P. Wms.* 28, 63; *Cruise, Devise*, ch. 18, § 14,) the devise was to the children of a person having no children at the death of the testator.

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In *Porter's case*, (1 *Coke's Rep.* 24,) the devise was, in effect, to a *future* corporation, and it could not take effect without the creation of such corporation after the death of the testator. See the remarks upon this case, (3 *Peters*, 115, 116,) and also the remarks upon the case of the *Baptist Association v. Hart's Ex'rs*, (4 *Wheat.* 1,) showing the distinction between it and the case in *Peters*, which latter, as I have already stated, was upheld as an executory devise to a corporation to be created by the legislature, upon the application of the trustees, as directed by the testator, in his will.

In my opinion the estate attempted to be created in the seminary was a contingent remainder, and would have been such at common law. I am also of the opinion that all the contingencies upon which an estate, created by will, is to depend, must be contained in the will, and that we cannot change the estate by incorporating any other contingency or condition. Indeed the statute, after declaring how a future contingent estate may be created, that is, whilst the person to whom, or the event upon which the estate is limited to take effect, remains uncertain, declares all expectant estates not enumerated and defined, abolished. The testator did not contemplate that any additional capacity should be conferred upon the devisee to enable it to take this remainder. If these views are correct, it follows that the devise was void, as the devisee had no power to take at the time the testator died.

I have referred to our statute relating to wills of real property, in which it is declared that no devise of real estate to a corporation shall be valid unless such corporation be expressly authorized by its charter, or by statute, to take by devise. (2 *R. S.* 57, § 3.) It is not claimed that the devise is valid unless the corporation had capacity to take by devise at the time the testator died; or unless the devise was executory, so that the power necessary might be conferred upon the corporation before the happening of the contingency upon which the estate was to depend. As has been already said, the will contains no contingency touching any future power to be con-

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ferred upon the corporation, so as to bring it within the principle upon which the case in *3 Peters* was decided. And I may be permitted to express serious doubts whether a devise upon such a contingency would be valid, in the face of our statute of wills. I shall not discuss the question.

The judgment should be modified, so as to declare that "The Trustees of the Theological Seminary of Auburn in the State of New York" have no title or interest in the real estate sought to be partitioned, and that the plaintiff, Mellicent A. Leslie, is seised in fee, as the heir of Edward B. Coe, her brother, of the said one-sixth, the one half of the undivided third devised to Edward.

[ERIE GENERAL TERM, May 14, 1860. *Marvin, Davis and Grover*, Justices.]

BENEDICT vs. HOWARD.

Where a tenant in common of personal property, consisting of shingle mills or machines and of a clapboard or siding mill, and an engine &c. used for operating such machinery and manufacturing lumber, removes such property out of the building in which it is situated, and puts up the mills and engine in a building of his own, in another town, several miles distant, and uses the same there, in the manufacture of his own lumber, this is such a destruction of the property held in common as will support an action by a co-tenant, for the conversion thereof.

APPEAL from a judgment entered upon the report and decision of a referee. The facts appear sufficiently in the opinion.

A. Lanning, for the plaintiff.

Comstock & Healy, for the defendant.

By the Court, MARVIN, J. The referee decided that the property was personal; that the parties to the action were

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tenants in common; and that the plaintiff had not proved such a conversion of the property by the defendant as entitled him to maintain the action, and for that reason nonsuited the plaintiff. To this decision the plaintiff excepted. The property consisted of two shingle mills or machines and a clapboard or siding mill. The property as a whole, was situate in the town of Bolivar, upon premises leased, and is spoken of by the witnesses as the mill. A witness describes it: "There was a building framed covering the mill; the bed of the arch was made of logs; they were buried in the ground, and on them a stone arch; it was built in the usual way of such mills; there were two shingle machines and one clapboard machine, all run by the same power and all fastened to the building; the boilers were second-hand boilers, about 30 inches in diameter, and about 16 feet long, one flue in each boiler. The whole concern, building and all, was worth \$2500; the machinery alone some \$1800.

The property, which belonged to the plaintiff and defendant as tenants in common, consisted then, as I understand it, of the property, as described by the witness, erected for use in a particular place, worth as a whole from \$2500 to \$3000, according to the statement of witnesses. The defendant became a tenant in common with the plaintiff, by purchase at a sheriff's sale of the interest of one Woodard a former tenant in common. He removed all the property except the building, and put the mills up in a frame of his own, upon his own premises, in the town of Amity, in the same county, several miles from its previous location; and after so erecting the mills (or machinery) upon his own lands, he used the mills in the manufacture of his own lumber; and this was the conversion complained of. The witnesses speak of the value of the mill as it was located, and of the benefit derived from its location; one of them valuing such benefits at from \$500 to 700, and the building and arch at \$300, and the machinery at \$1400 or \$1500.

It is well settled that one tenant in common cannot main-

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tain an action for the conversion of the common property, against his co-tenant, unless such co-tenant has lost, sold or destroyed the property, and the defendant, in this case, relies upon this principle for protection; and the referee must have found that there had been no sale, loss or destruction of the property by the defendant.

It seems to me that I should have held that the defendant had destroyed the property. The property as owned by these tenants in common was called a mill or mills. There was a framed building, an engine with boilers, &c., and two shingle machines, and a clapboard machine or mill, all run by the same power, and fastened to the building, worth as a whole, at the place of location, from \$2500 to \$3000. It was located where it was for a particular purpose—manufacturing lumber. It was upon lease lands; the lease having between two and three years to run, at a rent of \$500 a year. The defendant took out all the machinery, the engine, &c.; in short removed all of the property except the mere frame, and in doing so reduced the value of the property as a whole from one third to one half. He took these mills, so called, and the engines, &c. and put them up in a building of his own, upon his own land, in another town, a distance of several miles from the place where the property as a whole had been previously enjoyed by the tenants in common. It seems to me that this was a destruction of the property as common property. Its value to the plaintiff was greatly diminished. It was valuable to him for the purposes of manufacturing lumber where it was, but when removed to another place and put up there it ceased to be of any value to him. Indeed he could make no use of it without being a trespasser. Again, the character of the property had been changed from personal to real, and the plaintiff could not repossess himself of it without tearing it out of the building into which it had been fastened. And had he attempted to do this he would have been a trespasser. The reason of the rule why one tenant in common cannot maintain an action against his co-tenant for taking exclusive

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possession of the property fails in this case. Suppose there are tenants in common of a quantity of bricks and one of them takes the bricks and constructs a house with them, will he not be liable? The bricks are not lost or sold, but they are destroyed as personal property.

I think, in this case, as I understand the facts, the referee should have regarded the property as destroyed. (*See Wilson v. Reed*, 3 John. 175; *Sheldon v. Skinner*, 4 Wend. 530; *Co. Litt.* 200, *a and b*; *Agnew v. Johnson*, 17 Penn. R. 373.) *Fanning v. Ld. Grenville*, (1 Taunt. 241) is not in point. The whale was not destroyed, it was devoted to a proper purpose, viz. made into oil, which the plaintiff could take. I think the judgment should be reversed, and there should be a new trial, costs to abide the event.

[ERIE GENERAL TERM, May 14, 1860. *Marvin, Davis and Grover*, Justices.]

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 JACOB SHARP vs. THE MAYOR &C. OF THE CITY OF NEW YORK.

The act of the legislature, of April 19, 1859, "to enable the supervisors of the city and county of New York to raise money by tax," was not unconstitutional as containing matters not embraced in its title.

The statute does not require that the comptroller, upon an application made by him, under the 5th section, to open and reverse a judgment obtained against the city by collusion or fraud, shall show by affidavit the grounds on which his opinion, of the existence of collusion or fraud, is formed.

The act, being one for the benefit of the public, and intended to prevent fraud, should be liberally construed.

The making of the application by the comptroller, he being a sworn officer of the city, should be considered sufficient evidence, in itself, that he has reason to believe the cause exists which the statute requires, to warrant his action.

An allegation, by the comptroller, in his affidavit, that he believes that the claim upon which the action is based, is unfounded and fraudulent, is amply sufficient to enable him to take the necessary steps to move the court as provided for in the statute.

THIS was a preliminary motion, in behalf of the defendants, to compel the referee to prepare a statement and case, and

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other parties to furnish the necessary papers, &c. therefor, in order to move to open and reverse the judgment obtained against the defendants in this suit, pursuant to the 5th section of chapter 489 of the laws of 1859. (*Laws of 1859, p. 1123.*) The motion was founded upon an affidavit of one of the attorneys for the defendants, stating that the motion to open and reverse the judgment recovered in this case could not be fully and finally heard, nor all the circumstances upon which the right to recover in this action depends be fully developed, without a statement or case to be prepared by the referee, showing all the proceedings and evidence upon the trial before him; and that such a statement or case was essential to the proper hearing and determination of the motion. Also upon copies of a letter addressed by the defendants' attorneys to the referee, M. G. Harrington, Esq. requesting him to furnish them with a statement of all the evidence given on the hearing, and of the admissions made thereon by the counsel, with all objections, rulings and exceptions made and taken on the hearing; so that the said statement might form a complete case, such as would be made on reviewing the decision of the referee, in the action, including the points of counsel, the names of the counsel who appeared, &c.: and of the answer of the referee, declining to furnish such statement, &c.

For the motion, *Wm. Curtis Noyes*, in behalf of the Mayor &c. of the city of New York.

Opposed, *David Dudley Field*, for the plaintiff, Jacob Sharp.

Wm. Fullerton, for the corporation counsel, Richard Busted, Esq.

R. Busted, in person.

INGRAHAM, J. In this case a judgment was recovered against the defendants for damages, in consequence of a defect of title to certain portions of the slip now used for the Wall

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street ferry, amounting to \$40,953.56. The comptroller of the city now moves for an order to open and review the judgment, under the provisions of the statute passed at the last session of the legislature. The present motion is a preliminary one, asking for an order on the referee, to furnish a statement and case showing the proceedings before him on the reference in this action. The plaintiff and defendants, by their counsel, object to the authority of the comptroller to make this application on these papers. This objection involves a construction of the statute under which the application is made. By this statute (*Laws of 1859, § 5, p. 1127*) it is provided as follows: "Whenever the comptroller of the said city shall have reason to believe that any judgments now of record against the mayor &c. of New York, or which may hereafter be obtained against them, shall have been obtained by collusion or founded in fraud, he is hereby authorized and required to take all proper and necessary means to open and reverse the same," &c.

The first objection taken to this motion is, that the act is unconstitutional, because it contains matters not embraced in its title. The title is "An act to enable the supervisors &c. to raise money by tax." The 2d section provides for raising money to pay judgments then existing; the 3d section provides for raising money to pay judgments thereafter to be recovered.

It was necessary, in making such provisions, to enable the proper officers of the city to guard against the applications of such moneys to the payment of any other judgments than those which were legally a charge against the city. The mode adopted for that purpose was immaterial. Whether the comptroller, or any other officer, was authorized to ascertain that such judgments were properly recovered, before payment, it was a necessary incident to the previous provisions for their payment, and was intended to confine such payments to judgments fairly recovered against the city. It was not a different subject, but a provision by which the city authorities, before paying the moneys to be raised by tax, should have the means

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of ascertaining that the judgments so paid were really due. It was no more a violation of the constitutional provision on that subject, to provide for ascertaining before payment that the judgment was a valid judgment, than it was to insert a provision that the moneys so to be raised by tax should not be expended for any other purpose. Both provisions were proper and necessary to confine the payments of the tax to the objects for which the moneys were intended to be raised. (4 *Selden*, 241.)

It is also objected, that on the papers presented, the comptroller does not show a case entitling him to employ other counsel than the counsel for the corporation.

The affidavit on which this motion is founded, is made by the comptroller, and states the recovery of the judgment, on the report of a referee; that no consent was given to the reference; that the corporation counsel has declined to make a case, or bill of exceptions, or take any steps to review the decisions of the referee; that the comptroller believes the claim on which the action was based, is unfounded and fraudulent, and that a good defense exists thereto. He further states that the recovery of such judgment requires the action of the comptroller under the statute, &c. The right to make this application and employ special counsel therefor, depends upon this fact only, viz: whether the comptroller has reason to believe that any such judgment has been obtained by collusion or is founded in fraud. What has caused such belief is not required to be stated; nor is it necessary for him to disclose, as a preliminary statement to authorize him to act, what was the operation of his mind in arriving at such a conclusion, nor what acts particularly led him to such a belief. The words used are so indefinite as almost to amount to an authority to the comptroller to act on his own judgment in any case. Whether it is necessary for him to show by affidavit that he has come to the conclusion that there was collusion or fraud, is hardly necessary to be decided now. But considering that the comptroller is a sworn officer of the city; and that the statute is a



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beneficial one, intended to protect the treasury against fraud, and only reaches judgments obtained by collusion or fraud, in my judgment it should be very liberally construed. The application of the comptroller under such circumstances, even without an express charge of collusion or fraud, should be considered sufficient evidence that he had reason to believe that the case on which he makes the motion comes within the provisions of the statute. In this case, however, the affidavit of the comptroller shows affirmatively that he has reason to believe that the claim is founded in fraud, because he says in that affidavit—"That deponent believes that the claim upon which the action was based, is unfounded and fraudulent." Such a statement is amply sufficient to enable him to take the necessary steps to move the court, as is provided for in that statute. The object of this motion is to compel the referee to make a statement, or case, of the proceedings before him, and to furnish copies of the pleadings, papers, &c. used in the cause—or to compel the parties to furnish such copies. I am not satisfied that such a case could properly be made for such a purpose. The statute has provided a way in which the referee can be compelled to give evidence of any matter within his knowledge, (if he refuses to do it voluntarily,) by compelling him to appear before a judge of the court, or a referee, and submit to an examination under oath. For the purpose of a motion, such is the only course which appears to be proper to obtain his testimony. A statement made by him not under oath could hardly be proper to be used as evidence. It is not within the ordinary duty of a referee, and could not be considered as rendered under the oath he took as referee.

Nor do I think the papers show a case warranting the order asked for against the parties, as to copies of the papers. No application appears to have been made to the corporation counsel, for such papers. They are public documents, most, if not all of them, properly belonging in the department of which the comptroller is the head, and I cannot suppose that the corporation counsel would for a moment refuse copies of

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such papers to the comptroller if he applied therefor. It is apparent from the correspondence, which was read on this motion, that there was a difference of opinion between these officers as to the precise mode in which the comptroller should proceed, and from an unwillingness on the part of the counsel to allow another officer of the city government to control him in the management of what peculiarly belonged to his department, unless in the matters particularly provided for by law. As that point has now been adjudicated by the court, I should be unwilling to believe that officer would refuse an application on behalf of the comptroller, for such papers, but on the contrary, I presume, as avowed on the motion, that he will furnish to the counsel all such papers, on application therefor. The plaintiff's counsel also referred to an opinion expressed by the comptroller, in one of his letters addressed to the corporation counsel, in which he stated that he did not know of any facts going to establish either collusion or fraud, and urged that as a reason why this motion should be denied. It is sufficient to say, in answer to that objection, that such letter was written in July last. What other facts have come to his knowledge since are not known, but when he states under oath that he believes such claim is unfounded and fraudulent, I am bound to suppose that since writing that letter, he has obtained information justifying him in making that allegation. My conclusions in regard to this statute are—

1st. That the statute does not require that the comptroller should show by affidavit the grounds on which his opinion was founded of the existence of collusion or fraud.

2d. That the act being one for the benefit of the public, and intended to prevent fraud, should be liberally construed.

3d. That the making of the application by the comptroller, he being a sworn officer of the city, should be considered sufficient evidence in itself that he had reason to believe that the cause existed which the statute required, to warrant his action.

I have avoided the expression of any opinion on the merits of this motion, because the same was not argued before me,

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and such opinion more properly belongs to the judge before whom the motion shall be brought on. I think, however, so much of the motion as asked for a postponement of the argument upon the merits, until the necessary evidence from the referee can be obtained, should be granted. To enable the counsel for the comptroller to obtain such evidence, the other motion should be directed to be heard on the 15th of November instant, at 12 M. Copies of all affidavits and papers to be used thereon, in addition to those already served, to be served on the plaintiff's attorney four days prior thereto.

No costs granted on this motion.

[NEW YORK SPECIAL TERM, November 1, 1859. *Ingraham, Justice.*]

JACOB SHARP *vs.* THE MAYOR &C. OF THE CITY OF NEW YORK.

The supreme court has power to relieve a party to an action pending in it from a judgment or order obtained against him by reason of the negligence, ignorance or fraud of his attorney.

The modern practice is for the court to relieve the client, without reference to the responsibility of the attorney, when a proper case for granting relief is established.

Although the legislature has conferred on the department presided over by the corporation counsel, in the city of New York, the management of all civil actions brought by and against the city, and he is therefore not bound to conform to the directions of either the mayor or comptroller, nor to follow their advice, yet the right conferred upon the corporation counsel does not place him beyond the control and direction of the court, if it appears that his action, or omission to act, is injurious to the city.

It is the right of the city officers to apply to the court for protection, and it is the duty of the court to grant it, if it is made to appear that the conduct of the counsel is prejudicial to the rights of the city.

Where, upon an application made by the comptroller of the city of New York, to set aside a judgment obtained against the city for over \$40,000, on the ground of fraud and collusion, it appeared from the affidavit of the comptroller that the claim on which the action was based was unfounded and fraudulent, and that a good defense existed against the same; and it was shown that the corporation counsel had omitted to prove important facts

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upon the trial which it was his duty to prove ; that the questions arising in the case were so important, and involved in so much doubt, as not only to justify but to require counsel to take the opinion of the general term upon them ; but that although the comptroller and the mayor had, after the rendition of the judgment, applied to the corporation counsel to appeal from the same, to the general term, he had refused to do so ; *it was held* that a judgment recovered under these circumstances should not be permitted to stand ; and the same was ordered to be set aside.

When an action has been referred, and tried by the referee upon the facts, and a report made by him, and a new trial is ordered, it is not, ordinarily, proper to send it back to the same referee.

The general practice is, to vacate the order of reference, on granting a new trial, on the application of either party, and to refer it to a new referee, if the cause is referable, or to retain it in court if it is not.

Whether a referee shall be retained or removed, when a new trial is ordered, is a question addressed to the discretion of the court ; and from the decision thereon no appeal lies, *if seems*.

When a cause is referable only on consent, and the court sees fit to take it from the referee appointed therein, it cannot supply the vacancy. Hence the case must go back upon the calendar, or be deemed and treated as an arbitration.

THIS was an appeal from an order made at a special term, vacating a judgment recovered by the plaintiff, Sharp, against the defendants, the mayor, aldermen and commonalty of the city of New York, for \$41,425.88. The application was made by Robert T. Haws, comptroller of the city, in behalf of the corporation, under the 5th section of the act of April 19, 1859, "to enable the supervisors of the city and county of New York to raise money by tax," and was founded upon an affidavit made by him (among other papers) in which he stated, that he had been comptroller of the city of New York since the first of January, 1859 ; that he had been informed and believed that a judgment had been recovered in this action for the sum of \$41,425.88, on the first day of June, 1859, as appears by the record of the judgment ; that the action was commenced before this deponent came into office, and appeared to have been referred on the 18th September, 1858, to M. G. Harrington, Esq. ; that no consent appeared to have been given to the reference, and the deponent

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believed that none was given ; that the defense of the action was managed by the corporation counsel and his assistants, and that he had declined, although requested by the deponent and the mayor, to make a case or bill of exceptions, or to take any other steps to review the decision of the referee ; that an execution had been issued upon the judgment and is now in the hands of the sheriff, who had levied upon and was threatening to advertise the property of the city, to satisfy the judgment ; that deponent believed that the claim upon which the action was based was unfounded and fraudulent ; that a good defense existed and still exists, against the same ; that the said defense was not properly or fully brought before the referee ; and that the recovery of the said judgment required the action of the deponent, as comptroller, under, and that it is a case within, the fifth section of the act entitled "An act to enable the supervisors of the city and county of New York to raise money by tax," passed April 19th, 1859, and that the said judgment ought to be set aside, or its execution suspended, the order of reference set aside, and the defendants permitted to defend the action anew. That the resolution reducing the rent of the ferry in question in this action, was passed upon the application of the ferry company, and was in writing, and that reports were made upon it in both branches of the common council. That although the resolution itself was given in evidence before the referee, yet, neither the said application, nor the said reports, nor the proceedings of the common council leading to the resolution, were given in evidence. That deponent was advised and believed, that all such evidence was competent and admissible, and ought to have been put in ; and he was also advised by his counsel that the defendants have a good and substantial defense upon the merits of the said action, and he verily believed the same to be true. That he, the deponent, under and by virtue of the said fifth section of the said act, had retained attorneys and counsel, to take all proper and necessary means to open and reverse the said judg-

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ment, and to use the name of the said mayor, aldermen and commonalty for that purpose.

The following opinion was delivered by the judge who heard the motion at the special term, on deciding the same :

CLERKE, J. "By the 5th section of an act entitled 'An act to enable the supervisors of the city and county of New York to raise money by tax,' (*Laws of 1859, p. 1127,*) the comptroller of the city, when he has reason to believe that any judgments of record against the mayor &c., or which may thereafter be recovered against them, have been obtained by collusion, or founded in fraud, not only is authorized, but required, to take all proper and necessary means to open and reverse the same, and to use the name of the mayor, aldermen and commonalty, and to employ counsel for that purpose.

The first question which arose in my mind when this motion was commenced before me was, whether a judgment could be opened on an application made by the comptroller, pursuant to this statute, when no collusion or fraud has been directly and affirmatively shown, but, nevertheless, palpable error in the proceedings, and palpable inadvertence and misconception of duty on the part of the defendants' counsel.

The comptroller swears that the action is unfounded and fraudulent, and this belief, whether afterwards substantiated by direct proof or not, is a sufficient justification to him for instituting the proceeding. For this he is responsible to no one ; if he, sincerely entertaining the belief, brings the case before the court, and, on the motion, circumstances are disclosed, not amounting to collusion or fraud, except such fraud as may be inferred from the manner in which the reference was obtained—not amounting even to intentional breach of duty in any respect on the part of the defendants' counsel, but to gross error and mistake, by which a judgment for a large amount has been rendered against the defendants, and the time for remedying the error by appeal has been allowed to elapse, is it not the duty of the court, now that the case has been properly and legally brought before it, to give the defendants

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an opportunity of being again heard and effectively defended ? Undoubtedly, judgments, as I said on a former occasion, not dissimilar to this, should not hastily, or for slight causes, be set aside ; but, where the mistake is manifest, and where an erroneous judgment has been obtained, through the inadvertence of counsel, or any other cause, which the defendant himself does not directly sanction, the administration of justice can never be hindered or embarrassed by opening the judgment, and giving the defendant an opportunity of being heard before the suitable tribunal. There are many reasons which satisfy me that the judgment in this action should be opened ; at this time and place it is not necessary that I should enumerate, or even indicate, all of them. It is sufficient to mention one : This is an action for representations by the defendants' agents, in relation to the extent of a right, which afterwards proved to be false, to the great alleged damage of the plaintiff.

A motion was made by the plaintiff's counsel for a reference, upon an affidavit stating that the trial of the action would occupy a *long time*, and that a number of separate and distinct *facts* would have to be proved by a large number of witnesses. The notice contained the name of the person whom the plaintiff wished to be appointed referee, requiring that the whole of the issues in the cause should be heard and determined by him. This motion, it appeared from the order, was opposed by the counsel of the corporation ; whether he actually attended to contest it, so that the judge was made aware of an earnest and real opposition, I am not informed ; but it is quite certain that he did not consent in writing, so that the order, to all intents and purposes, was a compulsory reference. Now, although by section 270 of the code, all or any issues in an action, whether of fact or law, or both, may be referred upon the written consent of the parties, section 271 provides that no reference can be *compulsorily* ordered — that is, without the consent of both parties — except the trial shall require the examination of a *long account* ; in which case the referee may be directed to hear and decide the whole issue ; and ex-

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cept where the taking of an account shall be necessary for the information of the court before judgment, or for carrying the judgment into effect. The order of reference in this action could have been granted only under the first subdivision of the latter section (271)—that is, on the ground that the trial required the examination of a long account. But no such pretense is set forth in the affidavit on which the application is founded; it only states, that a number of separate and distinct facts will have to be proved by a large number of different witnesses. Nor does it appear from the pleadings that the examination of a long account, in the legitimate sense of an *account*, could be involved. The plaintiff, indeed, states by way of aggravation of damages, that he was obliged to expend large sums of money, and to contract to pay large sums of money, but this could not constitute an account against the defendants, so as to bring it within the policy of the law, which compels, in actions growing out of certain dealings based upon an express or implied contract between the parties to an action, or their representatives, a departure from the ordinary method of trial in common law actions. No account of this description can be necessary in an action of tort, or sounding in tort; indeed, if this were permitted, that provision of the constitution, declaring "the trial by jury, in all cases in which it has been heretofore used, shall be inviolate forever," could be always evaded. That is a constitutional right which cannot be too faithfully preserved; and any legislative provision tampering with it should, at the least, be very strictly construed. Compulsory references should be rigorously confined to cases invoking the examination of a *bona fide* account in an action of contract, and should, also, be literally and truly, a *long* account. I, therefore, think that the court which granted the order of reference, most manifestly exceeded its power, and, as I believe from some misapprehension, committed a grave error. It would not, perhaps, be proper for me, sitting at special term, to review the action of another judge also at the special term, even in cases of this

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description, where the order is voidable. But, here is a statute calling upon the courts to interpose, as if in an emergency, and requiring a certain officer different from the head of the law department of the corporation, to make the application, and questions of vital importance, in which the interests of nearly a million of persons are concerned; we find undoubted and flagrant error, forcing the trial of a difficult and complicated cause before a tribunal, in contravention of the constitution, and no effort made to rectify the wrong by appeal. Shall I, under such circumstances, hesitate to afford to the defendants such a trial as they are constitutionally entitled to? I am confident, if the judge who granted the order of reference, heard the motion, which I am about to decide, and recalled the circumstances under which it was granted, that he would be the first to revoke his own order, and set aside the judgment founded upon it.

As I have already intimated, it is unnecessary to consider the other objections to the manner in which this judgment was obtained. The order of reference alone would be fatal to it.

The judgment must be set aside, and the order of reference revoked, with costs."

From the order entered upon this decision the plaintiff appealed to the general term.

David Dudley Field, for the appellant.

Wm. Curtis Noyes, for the mayor &c. of New York.

By the Court, MULLIN, J. This court has power to relieve a party to an action pending in it from a judgment or order obtained against him by reason of the negligence, ignorance, or fraud of his attorney. The rule formerly was, that the party injured by the neglect or misconduct of his attorney was compelled to resort for relief to an action against the attorney,

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unless it was shown that the attorney was insolvent, in which event the court could relieve. The remedy by action was a mere illusion, even against a solvent attorney, and hence the recent and, in my opinion, the more just practice is for the court to relieve the client without reference to the responsibility of the attorney, when a proper case for granting relief is established. There is no justice in permitting one party to obtain an undue advantage over another, through the neglect or misconduct of that other's attorney. Courts of law are not to be used by parties in effecting, through the forms of law, the ruin of a party who has employed an incompetent, negligent, or unworthy attorney. It is only when the courts require of their attorneys and suitors the exercise of entire good faith in the prosecution or defense of actions that they discharge their whole duty to the community.

In this case, the comptroller of the city made oath that the claim on which the action is based was unfounded and fraudulent, and that a good defense existed and still exists against the same. It further appears that after the rendition of this large judgment against the city, both the comptroller and the then mayor applied to the corporation counsel to appeal from the judgment, entered on the report of the referee, to the general term, and that he refused.

The legislature had conferred on the department presided over by the corporation counsel the management of all civil actions brought by and against the city. He was not bound, therefore, to conform to the directions of either the mayor or comptroller, nor to follow their advice. Yet, the right conferred upon the corporation counsel did not place him beyond the control and direction of the court, if it appeared that his action, or omission to act, was injurious to the city. It is the right of the city officers to apply to the court for protection, and it is the duty of the court to grant it, if it is made to appear that the conduct of the counsel is prejudicial to the rights of the city.

It becomes necessary to inquire into the conduct of the cor-

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poration counsel, in order to ascertain whether the rights of the city have been neglected or unfairly yielded in their defense of this action.

I will not go into a history of the case, further than to refer to one or two facts which are disclosed by the papers, and which bear on the question under consideration.

The lease obtained by the plaintiff recites the resolution of the common council, on the 16th June, 1852, directing the leasing to the plaintiff of the slip at the foot of Wall street, or so much thereof as belongs to the city. The lease, which is dated the first day of July, conforms to the resolution, and uses, in the leasing clause, the very words of the resolution. The same qualifying words are used again in the habendum clause. It is further provided by said lease as follows: "And it is hereby mutually covenanted and agreed by and between the parties to these presents, and these presents are upon the express understanding that nothing herein contained shall be taken or construed to operate as a covenant by said parties of the first part, or their successors, for possession or quiet enjoyment by said party of the second part, &c. of the said ferry or right to ferriage, nor shall the same be taken or construed to interfere in any manner with any previous grants or rights, made by said parties of the first part * * * nor to operate further than to grant the possession of the estate, right, title, or interest, which the said parties of the first part may have, or lawfully claim, in said ferry and right to ferriage, by virtue of their charter," &c.

The plaintiff covenanted to pay to the city \$20,000 per annum rent for the use of said ferry, in quarter yearly payments. At the time this lease was applied for, one Murray had or claimed the right to a portion of the slip, which rendered the slip useless for the purpose of a ferry. The right of Murray to the portion claimed by him was established by a judgment of the superior court, and the plaintiff, in order to get the use of the whole slip, rented of Murray his portion of the slip at the annual rent of \$4000. In October, 1853, parties owning

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the whole or some part of the interest of the plaintiff under said lease, applied to the common council to reduce the rent of the slip, and it was reduced to \$5000 per annum. This fact was set up in the answer, but without any allegation as to whether the reduction thus made was in consideration of the claim of Murray to said slip. And it is certified by the referee that no evidence whatever was given on that subject, before him.

The gravamen of the plaintiff's action is the misrepresentation made by the agents of the city, and by means of the maps in the street commissioner's office, that the city owned the whole slip, whereas, in truth and in fact a portion was owned by said Murray. The referee finds, as matter of fact, that the plaintiff was misled in regard to the extent of the city's interest in the slip, and, as matter of law, that the possession of Murray was not notice to the plaintiff of his (Murray's) right.

Without deciding now whether the representations of the agents of the city were binding upon it, so as to give the plaintiff a right of action, or whether the possession of Murray was notice to the plaintiffs of his (Murray's) right, or whether the circumstances attending the reduction of the rent were legitimate evidence in the cause, or how far they might operate by way of defense to the action, it seems to me that each and all of the questions were so important, and involved in so much doubt, as not only to justify, but to require counsel to take the opinion of the general term upon each and all of them.

So large a claim should not be submitted to, unless it is based upon such clear principles of right and justice, as to remove any serious doubt as to its validity. When, therefore, the comptroller and mayor applied to the corporation counsel to appeal from this judgment, it was a request which he was in duty bound to grant.

It seems to me that no reason has been given why a judgment, recovered under these circumstances, should be permitted to stand. I will not assume to say whether the referee

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was right or wrong in his decisions on the legal questions involved, but I do say that the omission to prove the facts and circumstances attending the reduction of the rent, and the motives and inducements which led to it, was a violation of professional duty, which the counsel owed to his client, the city.

I concur with Judge Ingraham, in his views as to the constitutionality of the act entitled "An act to enable the supervisors of the city and county of New York to raise money by tax," being chapter 489 of Laws of 1859. The provisions relating to applications to set aside judgments recovered against the city, are germane to the subject matter of the act, as disclosed in its title, and although the act may apply to judgments, the payment of which are not provided for by the act in question; yet it does properly apply to judgments then and thereafter to be rendered, and thus the constitutional objection is avoided. If any provision in regard to the setting aside of judgments or limiting the powers of the corporation counsel, could be incorporated in the act without coming in conflict with the act, then all its provisions must be deemed to be in force.

I do not deem it necessary, however, to pass upon the constitutional question. The court had, and has, ample power to protect the city, as it protects all other parties, from the consequences of the misconduct or neglect of their attorneys.

I am of the opinion, therefore, that the order of the special term, setting aside the judgment, was right. It is due to the city that a full and fair opportunity be afforded to it to try the case; but it seems to me that upon the papers in this case, neither the plaintiff nor his counsel is chargeable with any fault in reference to the judgment, and if the city desires to retry the cause, it should pay to the plaintiff the costs of the former action and of the motion.

When an action has been referred, and tried by the referee upon the facts, and a report made by him in the cause, and a new trial is ordered, it is not ordinarily proper to send it back

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to the same referee, and for very obvious reasons—he has heard and seen the parties and their witnesses, he has formed his estimate of their credibility and of the force and effect of their evidence, and the defeated party enters upon a new trial before him, with the views and prejudices of the referee all against him. This is a current which the party ought not to be required to struggle against. The parties do not stand equal before the referee. He is not indifferent between them. No one would think of trying a cause a second time before the same jury, and although an intelligent referee would be less likely to retain or act on his convictions received on the former trial, yet he is but a man, and with the best intentions, he may be unable wholly to lay aside or forget his bias.

For these reasons the practice is becoming quite general to vacate the orders of reference on granting a new trial on the application of either party, and to refer it to a new referee, if the cause is referable, or to retain it in court if is not.

Whether a referee shall be retained or removed, when a new trial is ordered, is a question addressed to the discretion of the court, and the decision upon which it seems to me is not appealable.

This action was referable only on consent. When the court saw fit to take the case from the first referee, it could not supply the vacancy, and hence the case must go back upon the calendar, or be deemed and treated as an arbitration.

It has not been suggested that this action had been turned into an arbitration by means of the reference; and if not, the order of the judge at special term, setting aside the order of reference, was regular.

The order appealed from must be affirmed.

[NEW YORK GENERAL TERM, May 7, 1860. *Sutherland, Mullin and Bonney*, Justices.]

JOHN A. STEVENS and others vs. THE BUFFALO AND NEW
YORK CITY RAIL ROAD COMPANY and others.

As between mortgagees and judgment creditors or purchasers, the rolling stock of a rail road company—such as locomotive engines, tenders, passenger, freight or other cars, shop-tools and machinery—is *personal estate*; and will not pass as *real estate*, or fixtures, under a mortgage executed by the company; nor can it be held by the mortgagee by virtue of his mortgage, as personal estate, unless he has caused such mortgage to be filed as a *chattel mortgage*, according to the provisions of the statute relating to chattel mortgages.

If a subsequent judgment creditor levies upon such rolling stock, and sells the same, by virtue of an execution issued upon his judgment, the purchaser will be entitled to hold the same, discharged of the lien of the prior mortgage.(a)

Notice to a judgment creditor, of an existing mortgage, is no answer to his objection that the mortgage has not been filed.

A PPEALS by the plaintiffs, and by the defendant Patchin, from a judgment entered upon the report of a referee. The action was brought to foreclose a mortgage executed by the defendant, The Buffalo and New York City Rail Road Company, to the plaintiff John A. Stevens, as trustee for the holders of certain bonds issued by the said rail road company, to secure the payment of which bonds the mortgage was executed. Answers were put in by certain of the defendants, among whom was Patchin, upon which issues were joined, and the cause was referred to the Hon. Joseph G. Masten to try the issues made by the defendants who had answered, and to compute the amount due on the mortgage, and make the proper examinations, and report as to the defendants who had failed to answer. The issues were tried before the referee, who made his report, and judgment was entered thereon. The facts proved on the trial, as they appeared from the report of the referee and the exceptions of the respective parties upon which they have appealed, are as follows: On the first day of November, 1852, the defendant, The Buffalo and New York City Rail Road Company, executed the mortgage in

(a) See the next case, *Beardsley v. The Ontario Bank and others, &c.*

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question to the plaintiff Stevens. The mortgage contained recitals setting forth the facts that the rail road company was engaged in extending and constructing its road from Attica to Buffalo; that for that purpose the company had resolved, in pursuance of the power conferred upon it by law, to borrow from time to time such sums of money as it should deem best, not exceeding five hundred thousand dollars, and for the security of such loans to execute and issue the bonds of the company for one thousand dollars each, payable on the first day of November, 1860, with coupons attached for the interest on such bonds at the rate of seven per cent per annum, payable semi-annually; that the bonds were to be all equally secured by the mortgage, and to be in the form set out in the mortgage. The mortgage contained a blank form of the proposed bonds, which contained an acknowledgment of indebtedness on the part of the company of one thousand dollars, payable as already stated. It also contained a statement that the bond was one of a series of five hundred of like tenor, date and amount, and that the holder was entitled to the security derived from a mortgage bearing even date with the bond, duly recorded, on all the lands and *fixtures, and all other property* and appurtenances of the company, from Attica to Buffalo, executed to John A. Stevens, to secure the payment of the bonds. The mortgage then proceeds to state that for better securing the persons "who shall lend the said money or *hold the said bonds*" the payment of said money with interest, &c., the company grants &c. certain real estate described in the mortgage, extending in and from the town of Attica to a point in the city of Buffalo five hundred and three and a half (503½) feet easterly from the easterly line of Michigan street in said city, and also all the land on which any part or portion of the said rail road &c. of the company "*shall or hereafter may be constructed,*" between the last mentioned point and the said easterly line of Michigan street, and "all tolls, incomes, issues and profits to be had from and all franchises relating to the same," whenever the said company

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should be in default in making said payments, &c., and all the locomotive engines, tenders, passenger cars, freight or other cars, shop-tools and machinery now owned, "*or hereafter to be acquired and owned,*" by said company.

The mortgage also contained a covenant that the money loaned on said bonds should be applied in good faith to the construction of the road, and that the company would execute such further assurances as should from time to time be necessary or advised by the counsel for the mortgagee, to carry out the objects of the mortgage, or to enable the same to comprise the property expressed to be mortgaged or so intended to be, whether then acquired or thereafter to be acquired. The mortgage was duly proved and recorded in the clerk's offices of the several counties through or into which the road ran, or in which it had any real estate, *but the mortgage was never filed as a chattel mortgage.* The company executed and issued five hundred bonds, each for the amount and in the form of the bond set forth in the mortgage, which were numbered from one to five hundred inclusive, and negotiated them to divers persons who advanced money upon them, which was necessary to complete and operate the road. The bonds were mostly negotiated by the defendant Patchin, on behalf of the company. From 1848 to 1855 Patchin was a director of the company, and its chief financial officer. Four hundred and ninety-two of the bonds so executed and negotiated were produced and proved before the referee, upon which there was received \$492,000. The route of the rail road was located before the mortgage in suit was executed, and was subsequently built substantially as located before the execution and delivery of the mortgage.

Between the point 503½ feet east of Michigan street and that street the company had not extended the road, except a temporary track about 80 feet east of the first mentioned point, on the lands of the central rail road company, but the company had acquired all the lands between that point and Michigan street, except three small lots. The title to most

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of said lands had been acquired before the execution of the mortgage. Upon a part of the lands covered by the mortgage there were liens prior to the mortgage, which Patchin paid off with his own funds, previous to August 19th, 1856. He also paid, with his own funds, the purchase money of some of the lands acquired since the execution of the mortgage, and took the title to such lands in his own name, to secure the payment of the purchase money advanced by him. At the time of the delivery of the mortgage the company owned six engines and tenders, numbered from one to six; eight passenger cars, numbered from one to eight; four baggage cars, numbered from one to four; two mail cars, numbered one and two; and thirty-five freight cars, numbered from one to thirty-five.

Subsequent to the delivery of the mortgage, and in the course of a year thereafter, the company purchased other engines and cars, some of which were not in existence at that time, and also shop-tools and machinery. Some of the engines, six in number, subsequently acquired, were contracted for when the mortgage was executed; four other engines, and various passenger and freight cars, hand cars, rolling stock, tools and machinery were purchased at a subsequent time during the year, and put upon the road for use, and have ever since that time been used there by the company, in transacting its ordinary business, and have never been used any where but on said road, except that some of the cars have been run from Hornellsville (where said road forms a connection with the New York and Erie Rail Road,) to New York and back, in the transaction of business. In December, 1853, Patchin recovered a judgment against the company for \$155,641.78, which was duly docketed and executions were issued thereon, upon which all the cars, engines, shop-tools and machinery then belonging to the company were seized by the sheriffs to whom such executions were directed, and sold at sheriff's sale, Patchin being the purchaser. The directors of the company recognized and sanctioned this sale and the purchase made by

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Patchin. At the time of said sale the company had no funds or means to pay the said judgment and prevent a sale of the property.

On the first day of September, 1853, the company executed to the plaintiff, John A. Stevens, a mortgage similar in its terms and objects to the mortgage in suit, upon the road from Hornellsville to Buffalo, including the branch or freight track, with all the appurtenances, &c. This mortgage also included in its terms the rolling stock, tools and machinery, &c. In February, 1855, an action was commenced for the foreclosure of this mortgage. The usual judgment for sale and foreclosure was obtained in that action, and the liens and claims of Patchin for moneys advanced by him to discharge prior liens upon, and to pay the purchase money of, certain lands included in both mortgages, as hereinbefore stated, were established by the said judgment, and were directed to be paid out of the first moneys arising upon the sale to be made under said judgment. The lands of which Patchin had paid the purchase money were ordered to be included in the sale, and if any other person than Patchin became the purchaser he was directed to quitclaim to such purchaser. The rail road and rolling stock were sold under this judgment, and the whole bid off by A. D. Patchin, to whom the referee executed a conveyance. The property produced on such sale more than the costs and expenses of the action and sale and the preferred liens of Patchin. The latter gave to the referee who made the sale written instructions to pay the bondholders in full first, and consented to receive the balance of the proceeds of the sale which might remain after the bondholders were paid, in full satisfaction of the sums adjudged to be paid to him. Patchin paid upon said sale the costs of the action and expenses of the sale, and delivered to the referee the receipts of the bondholders for the amount of the proceeds going to them, and made an arrangement with them simultaneously with the delivery to him of the referee's deed of the real and personal property, and delivered a mortgage to James G. King and

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William C. Pickersgill, in trust to secure the payment of the debts due to the bondholders. Upon these facts the referee decided that the mortgage in suit was a valid and subsisting lien upon that part of the company's road between Attica and Buffalo, and upon all the lands described in the mortgage, together with the railways, side tracks, branches and all other fixtures and superstructures and erections erected upon the lands described in the mortgage, and upon all tolls, incomes, issues and profits to be had from, and all franchises relating thereto, *without respect to the time when the title to the lands mentioned in the mortgage were acquired by the company*; that as against the plaintiffs and the purchasers under the judgment, the liens existing upon the lands prior to the company's title, and paid by Patchin as above stated, were discharged, and that as against the same parties Patchin was not entitled to hold the lands of which he had paid the purchase money as above stated; that those lands should be included in the sale to be made under the judgment to be entered on the report; and that Patchin should quitclaim the same to the purchaser at the sale. The referee further decided that the plaintiffs were entitled to a judgment for the sale of the engines, tenders and cars owned by the company at the time of the delivery of the plaintiffs' mortgage, and that the plaintiffs were not entitled to a judgment for the sale of any other of the engines, cars, shop-tools and machinery, except such tools and machinery as were so attached to the realty as to be fixtures between vendor and vendee.

During the trial exceptions were taken by the respective parties, in proper time and form, to raise the various questions considered in the opinions.

S. G. Haven, for the plaintiffs.

J. G. Hoyt, for the defendant Patchin.

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GREENE, J. (After discussing some questions not necessary to be mentioned here.) The most important question in this case remains to be considered. That question relates to the nature of the property known as the rolling stock of the company, including its engines and cars of various kinds and the property described as shop-tools, machinery, &c.; all of which is used, in one way and another, in the operations of the rail road; and so far as the title to this class of property is involved in the case, it turns upon the question whether such property is personal property or fixtures; or, to state the question in a simpler form and so as to present its precise legal aspects in a clear light, and the opposing views of the parties in plainer contrast, whether it is *personal* or *real* property. If such property, after it is purchased for the use of the company and put upon its road, is *ipso facto*, so affixed to the realty as to become, in judgment of law, a part of the realty, the lien of the mortgage attached to the property in question, as fast as it was acquired, and the plaintiffs are entitled to it, without regard to the time of its acquisition.

If, on the contrary, after it is placed on the road, it retains its character of personal property, which it clearly was before, the plaintiffs' claim must fail, irrespective of the question whether a mortgage of personal property to be acquired after its execution is sufficient to give a title to or create a lien upon such property, in equity. For if such title or lien can be so created, it relates to personal property, and the law applicable to that species of property is controlling on questions both as to the original and continuing validity of the title or lien. The plaintiff's mortgage was in its terms a good chattel mortgage as to all personal property to which it was applicable, but it was never filed as a chattel mortgage, as our statute requires, (*Laws of 1833, p. 402, § 1,*) in order to preserve its lien as against creditors; and as this question arises between the mortgagee and a creditor of the mortgagor, the mortgage, so far as it relates to the personal property, is void under the provisions of the statute last cited, and the plain-

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tiffs' title, so far as it rests upon the mortgage, must fail. This was conceded on the argument. But the plaintiff claims that the rolling stock, &c. "acquired after the date of the mortgage and used by the company in operating the road, are fixtures, or *in the nature of fixtures*, and are appurtenant to the road and other mortgaged property." As to the same kind of property existing and on the road at the date of the mortgage, the plaintiff asserts a title on another ground, which will be considered hereafter. The alternative phrase "*or in the nature of fixtures*," used in the plaintiffs' points to describe the character of the property in question, is too indefinite and vague for any practical purpose. There is not, to my knowledge, any intermediate state or condition between property regarded as personal either in the legal or popular sense of the term, and that which though originally personal has been so affixed or attached to real property as to become merged in and part and parcel of the realty. It must, in the nature of things, be one or the other. It cannot be both, nor can it for any legal purpose be said to partake of the nature of both. The property in question then, as has already been stated, is either personal or real property, and the plaintiffs' title depends upon the decision of the question as to which class the property belongs to.

As an original question, I confess I should find it difficult to suggest a plausible ground of doubt in relation to it. None of the property in dispute is or can be affixed or attached to the real estate for any purpose for which it was intended to be used; nor indeed, without entirely defeating that purpose, within any sense of those terms as they are used as distinctive tests of the difference between personal property and fixtures. The engines, cars &c., composing the rolling stock, it is well known, are manufactured for sale to the different roads in the process of construction and in operation throughout the country. They are as well adapted for use on one road as another of the same width or gauge as the road for which they were built or on which they are in use; and partly worn stock of

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this kind is frequently sold from roads on which it has been used, for the purpose of replacing it by new and improved machinery. It has always heretofore been treated as personal property liable to seizure and sale on execution, and has often by means of that process been appropriated to the payment of the debts of the company.

But within the last year it has been claimed for the first time, that the universal opinion of the legal profession and the business community, which has been acted upon so often and by so many parties, and has been sanctioned by the acquiescence of all, including the courts, the legal profession and parties for the last twenty-five years, is founded in a radical mistake as to the nature of such property; and in addition to all this, it is claimed that property in familiar use long before rail roads were known, which has always been and is now held, and is by the parties who advance this new doctrine conceded to be personal property under other circumstances and when held by other owners, is, by reason of the fact that it is owned and in the use of rail roads converted into real estate. In a word that by such use its nature is, *ipso facto*, changed. The proposition is a novel one, to say the least of it, and the sanction, direct and indirect, which it has received from judicial opinions and authority, if nothing else, entitles it to grave consideration. I will, therefore, proceed to examine some of the cases which have been cited as authority for this position.

The case of *Coe v. Hart and others*, (*Am. Law Reg. Nov. 1857*), decided in the circuit court of the United States for the northern district of Ohio, by Mr. Justice McLean, in July term, 1857, presented a controversy between the mortgagees named in the first mortgage (which included all property connected with the road) and the holders of certain bonds secured by a subsequent mortgage, who had obtained a judgment at law on their bonds and issued an execution, which had been levied on some of the cars and engines belonging to the company which executed the mortgage. Some of the property levied on was acquired by the company after the execution of

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the first mortgage, under which the complainants claimed. This mortgage contained a covenant on the part of the company to execute any further conveyance necessary to transfer to the mortgagee any property acquired subsequent to the mortgage, and comprehended in the description. The mortgage was recorded in all the counties through which the road was to be constructed. The complainants filed a bill for a perpetual injunction restraining the defendants from selling the property levied upon by them. The court held that the mortgage created a valid lien in equity upon, and attached to, subsequently acquired property as fast as it was acquired. It was further held that the holder of a bond secured by a mortgage could not proceed by judgment and execution at law to sell any of the property upon which the mortgage was secured; that such sale would not convey to the purchaser any exclusive right to the property so sold, or divest the equitable rights of other bondholders in such property, and that the claim of the bondholder must be prosecuted in equity, where all who have a like interest in the security of the mortgage may be made parties and have their rights adjusted. It does not directly appear from the case whether any other filing or recording of the mortgage than was shown was necessary to preserve its lien as a mortgage of chattels. But I infer from the reasoning of the opinion, that the court regarded the mortgage as valid in that aspect. It is nowhere intimated in the case that the property in controversy was real estate and bound as *such* by the mortgage. There are some general remarks in the opinion to the effect that the rolling stock is indispensable to the operation of the road and the earning of profits, &c. and that the mortgage having been taken upon the road as a whole in complete operation, the lien of the mortgage ought not to be displaced and its security impaired by permitting a sale of any of its property essential to its operation, on execution. But when the opinion is read in connection with the description in the mortgage, which contained apt and sufficient terms to pass a title to the property in question, and in the

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light of the equitable rule before alluded to, and upon which the court avowedly decided the case; and when, moreover, we regard the mortgage, as we must in the absence of any thing that appears in the case to the contrary, as a valid chattel mortgage, this reasoning is not necessary to sustain the case. It rests upon sound reasons independent of those alluded to.

The case of *Mitchell v. Hinslow*, (2 *Story's Rep.* 630,) upon the authority of which *Coe v. Hart* was decided, presented the question whether a mortgage of personal property, to be acquired after the execution of the mortgage, constituted such a lien in favor of the mortgagee, upon such subsequently acquired property, as was protected by the provisions of the 2d section of the general bankrupt law of the United States. The question arose between the mortgagee and the assignee of the bankrupt mortgagor. Mr. Justice Story held that the mortgage attached in equity as a lien or charge upon the particular property, as soon as the mortgagor acquired a title, as against him and all persons claiming under him, either voluntarily or with notice or in bankruptcy.

The case of *Corey v. The Pittsburgh, Fort Wayne and Chicago Rail Road Company*, a newspaper report of which has been furnished to us, presented a similar question to that decided in *Coe v. Hart*. An execution creditor had levied upon certain rails that had been temporarily removed from their place in the road bed for repairs, and upon a small quantity of iron chairs which were placed on the road and were intended for use there, but had never been affixed to the road bed. The president of the company, on its behalf and on behalf of the mortgagees, in a mortgage similar to the plaintiffs' mortgage in this case, moved to set aside the levy. As to the rails the case admitted of no doubt; they had been permanently affixed to the realty, and their removal for the purpose of necessary repairs did not deprive them of their character of fixtures, and the court so held. The court further held that the mortgage was valid as a chattel mortgage, under the statute of frauds, as against creditors, and cited the case of *Coe v.*

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Hart and several elementary authorities, to show that in equity such a mortgage, if sufficiently comprehensive in its terms, (as the mortgage in that case was,) would create a lien upon the future acquisitions of the mortgagor. These propositions disposed of the case, and the decision of the learned judge upon the question, whether the law upon principles of public policy and convenience would, as between the company and a creditor, protect the property which was necessary to the operation of the road from levy and sale on execution, is entirely *obiter*. The mortgagees, it will be remembered, were represented and their rights considered and determined on the motion, and if their title was superior to the rights of the creditors, the executions must necessarily have been set aside. The consideration, therefore, of the company's right independent of the mortgages, to prevent a levy and sale on execution, which right the learned judge rested upon the argument just alluded to, was wholly unnecessary to the disposition of any question involved in the case, except possibly a question of costs; and no such question appears to have been considered by the court.

The cases prove no such proposition as that now under consideration. Indeed it is nowhere affirmed or intimated that property of the kind, or situated like that in controversy in this action, is real estate. On the contrary the learned judge, who delivered the opinion in the case last cited, assumes that the rolling stock of a rail road is "personalty by nature," and puts its exemption from sale on execution, not on the ground that its nature is changed by placing it on the road, but on the ground of its necessity to the operation of the road. This is substantially the view which Justice McLean takes of the question, in *Coe v. Hart*. The question will be considered in this aspect hereafter. The case of *Seymour v. The Canandaigua and Niagara Falls R. R. Co.* (25 Barb. 284) involved a question as to the lien of the mortgage upon *lands* acquired by the company subsequent to the execution of the mortgage; and Mr. Justice Smith, at special term, held that the lien at-

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tached in equity, upon the acquisition of the lands, on the principles laid down by Justice Story in *Mitchell v. Hinslow*.

The case of *The Farmers' Loan and Trust Co. v. Hendrickson* (25 Barb. 484) is directly in point and in favor of the plaintiff's position. It is a decision of a general term of this court upon a case submitted by the parties without action. The case does not show what points were presented by counsel, or how elaborately the merits were argued. But the opinion delivered by Mr. Justice Strong shows that the case was thoroughly considered by him. And as the decision was concurred in by his associates, it should be received with the same respect here, as a decision made by us, and should not be overruled, except under the same circumstances that would induce us to review and overrule our own decision. That this should rarely be done, and that when done, it should be upon mature deliberation and for cogent reasons only, I concede. But that cases will occur when justice to parties interested and to the law requires it, the experience of all courts proves.

The controversy in that case arose between the plaintiff as the mortgagee in trust for the bondholders, to secure whom the two mortgages to the plaintiff were executed, and certain judgment creditors whose executions had been levied upon the rolling stock of the Flushing Rail Road Company, the mortgagor. The mortgages under which the plaintiff claimed were substantially like that under consideration here, the cars, engines, tools and machinery being mortgaged. The question whether future acquisitions of personal property would be included in such a mortgage did not arise, because one of the plaintiffs' mortgages was executed after all the property was acquired and before the levy under the executions was made. It was conceded also, that the plaintiffs could not hold the property as personal property under the mortgages, for the reason that they had not been filed as chattel mortgages. The learned judge who delivered the opinion came to the conclusion that the rolling stock was fixtures and passed as necessary incidents in a conveyance of real estate.

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It will be apparent, on a careful reading of the opinion, that the fact of the necessity of the rolling stock to the employment of the road exercised a great, and I think it fair to say, a controlling influence upon the decision. Indeed I think, upon a careful examination, it will be found that every other circumstance alluded to by the learned justice as a distinguishing feature between personal property and fixtures, exists rather in imagination than in fact. The learned justice cites several cases in which a very slight, and perhaps it is more correct to say a purely constructive annexation of personal property to the freehold, has been held to give such property the character of fixtures, and where the circumstance of the necessity of the chattels to the enjoyment of the freehold has apparently had great weight in determining its character; and compares these cases, so far as this feature is concerned, with that under consideration, and comes to the conclusion—a fair one, I concede—that the argument, founded upon necessity, applies with greater power to the case of a rail road than to most of the cases cited by him. But evidently foreseeing the logical consequences of this reasoning, and the practical results of the application of the rule, the learned judge proceeds to compare this species of property to farming implements and mechanics' tools, and then points out what he regards as the difference between the cases. "It is true that no mechanical or agricultural business can be carried on to any extent without tools or farming implements, and such tools and implements are universally conceded to be personal property; but then such tools or implements are not peculiarly adapted or confined to any particular establishment, but may be used upon them generally, and are subjects of frequent barter." Now I respectfully submit that each of the supposed differences here specified will, upon an appeal to facts, be found wanting in substance. As was remarked by Judge Denio, in the case of *Bishop v. Bishop*, (1 Kern. 126,) "we are allowed to know, judicially, what every person out of the court knows," that the engines, cars and other rolling

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stock on rail roads are, in their nature, no more peculiarly adapted, nor in point of fact confined to any particular establishment or road, than farming implements or mechanical tools are to particular farms or workshops. True, there is a difference in the width of roads requiring a corresponding difference in the width of cars, as there is a difference in the surface and soil of farming lands, requiring a corresponding adaptation to them of implements and machinery used in agricultural operations. It is a well known matter of fact, moreover, that the rolling stock of rail roads is often run and used habitually on other roads, hundreds of miles distant from the road to which such stock belongs, and into different states from that in which the road is located. It not only may be there, but it is in fact used 'generally' upon rail roads without regard to the particular road to which it belongs. This practice is so common, when roads of the same width connect, as to authorize me to refer to it as a fact of general notoriety. That this species of property is a subject of frequent and extensive commerce or 'barter,' I need hardly say. In this respect I confess I can see no difference between it and the other kinds of property referred to by the learned justice, none certainly that seems to justify the attempted distinction. As I have remarked in another place, this property is constantly being manufactured to supply the constantly existing and increasing demand. It is sold as an article of commerce, by the manufacturer, to rail road companies for their use, and not unfrequently made a subject of bargain and sale between different companies. The learned justice, after quoting, with approbation, the remark of Justice Weston in *Farrar v. Stackpole*, (6 *Greenl.* 154,) that the general principles of law should be applied to new kinds of property as they spring into existence, according to their nature and incidents and the common sense of the community, admits that this property, if submitted to that test, would hardly be determined to be fixtures, and remarks that the movable quality of rail road cars has frequently, if not generally, induced the opinion that they

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are personal property. The learned justice also admits that but for the supposed peculiarities of this property above referred to, and the fact that cars and engines were a necessary part of the entire establishment comprising a rail road, he would be "compelled by the weight of authority to decide that as they are not physically annexed to what is usually denominated real estate, they must be deemed personal property." This concession as to the state of the authorities renders it unnecessary for me to enter upon an analysis of the cases, in detail; I shall do no more than refer to the general definition of fixtures and the distinguishing characteristics by which the difference between them and personal property is determined, as stated by the late Justice Cowen, in the leading case of *Walker v. Sherman*, (20 *Wend.* 636.) The general rule laid down in that case by the learned judge after an exhausting and unusually critical examination of the authorities, is this: "In order to come within the operation of a deed conveying the freehold, whether by metes and bounds of a lot &c., or in terms denoting a mill or factory &c., nothing in a nature personal in itself will pass *unless it be brought within the denomination of a fixture by being in some way permanently, at least habitually, attached to the land or some building upon it,*" (page 655.) At page 653 the learned judge, speaking of the distinction between personal property and fixtures, says, "the ancient distinctions, however, between actual *annexation* and total *disconnection* is the most certain and practical; and should therefore be maintained, except where plain authority or usage has created exceptions." The learned judge, speaking of the reasoning of Mr. Justice Weston, heretofore quoted, in *Farrar v. Stackpole*, while he disapproves of the case, approbates a liberal application of that reasoning to modern machinery *in subordination to the rule* laid down in the principal case. This case has stood unquestioned for twenty years, as the law of this state. The plain, practical and wise rule laid down by Justice Cowen has been uniformly received as authority and



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cited with almost unanimous approbation in every case that has arisen since that time—and while it may be questionable whether it has always been correctly applied, there is no question that its soundness has always been recognized by our courts, and that it has been professedly applied by them. If there have been departures from it in particular cases, those cases, instead of tempting us further astray, should admonish us of the necessity of adhering more rigidly to it, as each succeeding departure, each additional exception, furnishes a new illustration of the value of the simplicity and certainty of the rule. Such then is the settled general rule of law in relation to fixtures.

It is virtually conceded by the learned judge whose opinion has been so often referred to, that this kind of rail road property does not come within the general definition of fixtures; that is, that it is not annexed or attached to the freehold, as the general rule on that subject requires it to be. If this is true of such property in general it is peculiarly so of the property in controversy. This road connects at its eastern terminus with the New York and Erie Rail Road, which runs thence to the city of New York, passing in its route through the states of Pennsylvania and New Jersey. We are informed by the plaintiffs' case that some of the cars in question have been run from Hornellsville to New York over the New York and Erie Rail Road, in the transaction of business. It is fair to infer, from the statement in the case and the well known course of business in such cases, that these cars have been uniformly used in this manner; that many, and possibly all of them, have been not only off from the road where they were owned, but out of the state where that road is located, and in the temporary possession and control of other companies, and that they are continually used in this manner. The statement of these facts, in connection with the proposition sought to be sustained by them, that these cars are so annexed to the road as to be a part of the realty, is in my judgment the most conclusive argument with which the proposition can be combated.

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The next question is, do these cars come within any of the exceptions which "*plain authority or usage*" has created? It has already been seen that the whole argument in favor of holding them to be fixtures rests upon two assumed facts, to wit: Their peculiar and exclusive adaptation and indispensable necessity to the operation of the road. I have endeavored to show that the first assumption is unfounded in fact, and I think it is apparent that the other is equally so. *Some* cars, it is true, are essential to the operation of a rail road. *But these particular cars* are no more necessary for that purpose than others of the same construction, which might be obtained to supply their places. The same means that put those cars on the road would procure others to take their places if they should be removed. To sell the rolling stock of a rail road would no more be a destruction of the road, in legal contemplation, than the sale of a farmer's teams, stock and farming utensils would be a destruction of his farm. In either case there may be a necessity of keeping the personal property, arising out of the pecuniary inability of the owner to replace it, and thus make the use of the other property, to which the personalty was essential, profitable. But the law regards no such necessity as this, for any purpose; certainly not for the purpose of enabling a debtor to retain his property for his own emolument, and set his creditors, or any class of them, at defiance. But this doctrine of constructive fixtures, founded upon the adaptation and necessity of personal property to the use of the realty, was expressly repudiated in *Walker v. Sherman*. The learned judge who delivered the opinion, in commenting upon the opinion of Justice Weston before quoted, said, "It does not appear to be sustained by authority when it seeks to raise a general doctrine of constructive fixtures from the moral adaptation of what is in fact a mere movable, to carrying on a farm or factory, &c. *however essential* the movable may be for that purpose."

The facts of the case then before the court presented that precise case for adjudication. It was apparent from the case,

and conceded in the opinion, that the machines then in question were essential to the business of the factory from which they were removed. But this fact was not allowed to control the case, in the absence of the one indispensable requisite of a fixture, to wit, physical annexation of some sort to the freehold. It is not to be denied that there are many cases in which these facts of adaptation and necessity have had a great and, in some exceptional cases, a controlling influence; and it is conceded by Justice Cowen, that in cases where these considerations apply with peculiar force, a slight annexation or connection with the freehold will be sufficient. But such a connection, and that (though slight) permanent or habitual and general must exist in order to constitute personal property a fixture. As Justice Cowen well remarks, "the argument in favor of the doctrine of constructive fixtures founded upon such considerations as are now urged proves too much. Such adaptation and necessity might be extended even to the use of domestic animals on a farm, and certainly to many implements in a manufactory which could never be recognized as fixtures without utterly confounding the rule by which the rights of the heir and purchasers have long been governed." The learned counsel for the plaintiff, with a clear and accurate appreciation of the consequences of the doctrine for which he contended, claimed in his complaint the shop-tools and implements used by the company for mechanical purposes in the repair of its engines and cars, which are mortgaged as such, *eo nomine*. Articles, in the language just quoted, which could "never be recognized as fixtures." And I can explain his omission to claim the wood and coal stored by the company at its various stations, upon no other hypothesis than that the necessities of the company, which constitute the foundation of the argument, are so great in that direction as to offer no temptation to the vigilance of the mortgagees. It may be said that this is an extreme case, but extreme cases which are natural and probable results of the application of general principles afford fair illustrations of such principles, and cor-



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rect tests of their soundness. The argument in favor of the position that engines and rail road cars are fixtures applies with equal force to fuel, and indeed to every thing else necessary to the effective operation of a rail road. Engines and cars without fuel would be as useless as the road bed and superstructure would be without engines and cars. And if for the reasons now urged, the latter are to be regarded as fixtures, why not the former? Many reasons given why cars are fixtures are more applicable to fuel than to cars, for that is always kept and consumed on the road, while the cars are frequently used elsewhere. I will refer briefly to some of the questions that must necessarily arise in the practical application of this novel doctrine. Suppose cars used on rail roads in this state to be judicially declared fixtures. In the course of their daily use, as appears in this case, they are run into adjoining states; what are they while there? If our law differs from theirs on this subject, which law is to govern? Is the general rule that the *lex rei sitæ* is to govern in all cases relating to the acquisition and transfer of the title to real estate, to follow and protect this property in another state? Or, if the laws of the other states through which these cars run agree with ours as to the character of such property when used on the road where it is owned, how will it be treated when it leaves that road and goes beyond the jurisdiction of the state where the road is located? It would be singular indeed, if property which was daily being moved from one state to another should be held to retain, through all its changes of location, the character of real estate; and more singular still if it should be held to alternate in its character from day to day, being real estate one day and personal property the next—its character depending upon the accident of location at any given time. This would be an unheard of anomaly in the law. Again; suppose a judgment to be recovered and docketed in one of the counties through which the road runs. Does the judgment, by virtue of such docketing, become a lien upon all the cars that may thereafter be run through or into that coun-

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ty? And may they be sold thereafter wherever they may be, without any manual seizure by the sheriff? These and innumerable other questions that might be suggested illustrate the utter inapplicability of the law of fixtures to such property.

The cases on the subject of the law of fixtures are not a little conflicting, and in consequence of this conflict in cases, and the numerous and anomalous exceptions to its general rules that have been established, it is often very difficult to discriminate between personal property and fixtures. But we shall greatly increase that difficulty if we do not entirely obliterate the distinction between the two kinds of property by multiplying exceptions. I think we are called upon in this case to take about the last step that remains to be taken towards the accomplishment of that result. I agree to the rule laid down in *Farrar v. Stackpole*, that the principles of the law should be applied to new kinds of property in such a manner as the nature and incidents of the property and the peculiar necessities under which the application is to be made, may require. But I can see no necessity in this case, nor any thing in the character or incidents of the property requiring or justifying the application to it of a rule different from that which is applicable to all other property. It has been suggested in several of the cases cited, and it is undoubtedly true, that the mortgagees lent their money upon the security of all the property of the road. It is equally true that the mortgage was originally a valid lien upon all the property owned by the company at the time of its execution; that that lien has attached upon all the real property acquired since and comprehended by the description in the mortgage. As to the personal property, the lien could have been perpetuated upon such property as the company then owned, by filing the mortgage as a chattel mortgage, in pursuance of the requirements of the statute on that subject; and if the mortgage did not attach, *proprio vigore*, to subsequently acquired personal property, the covenants contained in it created an obligation on the part of the company, which equity would have enforced, to execute the

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necessary conveyances to transfer a good title to such property as fast as it was acquired. By due attention to their interests on the part of the mortgagees, and a compliance with the rules and requirements of the law, they would have obtained and kept intact all the security upon which they can be supposed to have invested their funds. If they have disregarded the law and neglected the precautions which it requires of them, it is not only wiser but more just that they should be subjected to the consequence of their own neglect, than that the law be changed or perverted by forced construction, for their relief.

The argument that rail road corporations are created to serve the public, and that the public has such an interest in their maintenance and operation that the law will not, upon principles of public policy, permit a separation of the rolling stock from the road by means of a sale on execution, admits in my opinion of a very brief answer. The franchise granted to a rail road company, to construct and operate a rail road, is undoubtedly accompanied with an implied obligation on the part of the company to construct and operate such road, and for a failure to fulfill this obligation the franchise may be forfeited and the grant may be annulled by the legislature. But that the law will permit the company to hold property for its own private emolument which the labor and money of creditors has contributed to furnish, in defiance of those very creditors, on the ground that the public is interested in the success of the company and the continuance of its operation, is a novel and to me a startling proposition. Private property may be taken for public use on making adequate compensation to the owner. This prerogative of sovereignty has been in many cases delegated to corporations, on the idea that the enterprises for the promotion of which they were incorporated, were of a public nature and for the public benefit. But the idea that such corporations may acquire and retain property without compensation, and without such property being amenable to the ordinary process of the law, is one for which I think no

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countenance can be found in legal principle or well considered authority.

The rolling stock, shop-tools and machinery not affixed to the realty, being personal property, and the plaintiff's mortgage not having been filed as a chattel mortgage, it is void as against creditors, as a conveyance of personal property. The referee, therefore, decided correctly in holding that the plaintiffs were not entitled to a judgment for the sale of the rolling stock, &c. acquired subsequent to the execution of the mortgage. But I am not able to concur with him in his decision that the plaintiffs were entitled to a judgment for the sale of the rolling stock and other personal property on hand when the mortgage was executed. The mortgage of the plaintiff, so far as that property is concerned, must be sustained as a chattel mortgage, if at all. As such, it was void as against the defendant Patchin, for the reason that it was not filed in pursuance of the provisions of the statute. There would have been no question about this if the judgment creditor had been any one else than an officer of the road. But I understand that the referee put his decision upon the ground that as Patchin was at the time the mortgage was executed and negotiated, a director and the chief financial officer of the road, and as such negotiated the mortgage, he is estopped from questioning its validity as a mortgage upon all the property, real and personal, that the company then owned. With great deference to the opinion of the learned referee, I am not able to concur with him in this conclusion. An estoppel of this kind consists in the representation of some matter *in pais* (a mere matter of fact as distinguished from a legal conclusion) known to the party making the assertion, but unknown to the party to whom it is made, to be untrue, and made for the purpose of influencing the action of such party. Where such a representation has been made and has induced the party to whom it was made to act upon it in such a way that he will be injured if it is untrue, the party making the representation will be estopped from controverting its truth. Now

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what representation did Patchin make when he negotiated this mortgage? The case discloses none. But it may be said that he must be held to have represented as true what the mortgage purported on its face, so far as the property then owned was concerned—and in this aspect of the case we need consider it with reference to no other—this representation; if his acts are to be so construed, was true. The mortgage was perfectly valid as to that property, and the plaintiffs acquired all the title to it that any mortgagee of chattels ever does. But this is not the proposition that Patchin now denies. What he alleges now is that the mortgage, by reason of the neglect of the plaintiffs to file it, has become void as against subsequently acquired rights as a judgment creditor. No collusion between him and the other officers of the company, in recovering his judgment, is alleged, and I take it the mere fact of his being an officer of the company does not preclude him from recovering a judgment against it for a bona fide debt. Is he then, conceding that he would have been estopped from denying the original validity of the mortgage, estopped from asserting the superiority of his subsequently acquired rights over the mortgage, which rights have accrued in consequence of the subsequent neglect of the mortgagee? I think not. On the contrary, I think he occupies the same position of any other judgment creditor. All that can be alleged against him in consequence of his agency in making and negotiating this mortgage is, that he had notice of it at the time he recovered his judgment. But notice to a judgment creditor, of an existing mortgage, is no answer to his objection that the mortgage has not been filed.

On the ground last stated I think the plaintiffs' appeal should be dismissed with costs, and the judgment should be modified on the appeal of the defendant Patchin, by striking out so much as directs the sale of the engines, tenders, cars; shop-tools, and other personal property therein directed to be sold, and affirmed as to the residue, with costs.

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GROVER, J. It appeared on the trial that at the time of the execution of the mortgage, the rail road company owned several locomotives, and passenger and other cars, all of which the referee decided were bound by the mortgage; and he directed judgment for the sale thereof, with the other property embraced in the mortgage. It was further shown that after the mortgage was given to the plaintiff Stevens, the company became the owner of other engines and cars, which they had used upon the road, between Buffalo and Hornellsville, and the plaintiffs claimed that these were subject to the mortgage, and should be adjudged to be sold with the other property. The referee decided that they were not subject to the mortgage, to which the plaintiffs excepted, and their appeal is founded solely upon this exception. The following facts were shown upon the trial: That after the mortgage was given to the plaintiff Stevens, and before the commencement of the suit, the defendant Patchin recovered a judgment in this court against the rail road company, and executions were issued upon the judgment, and levied upon all the engines, cars, &c. in question, as personal property, and that the same were sold upon said executions, by the sheriffs of Erie, Wyoming and other counties, wherever the same were found, and that the defendant Patchin became the purchaser at such sales. The plaintiff's mortgage had never been filed as a chattel mortgage. If the engines and cars are personal property, then Patchin acquired a good title to them by his purchase upon the execution. If they are fixtures, then Patchin acquired no title by his purchase; and the inquiry would be, to what portion of the road these engines and cars pertained as fixtures. The road extended from Hornellsville to Buffalo. The plaintiff's mortgage only covered the road from Attica to Buffalo, almost one third of the entire road. The questions arising in various forms, between the owners of the realty claiming property as fixtures, and those claiming the same property as personal, have been very numerous. The books abound in cases, and yet after the lapse of centuries no certain rule has been

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established the application of which to a case like this would remove all doubt. In the early history of the common law, the question usually arose between the personal representatives and the heir; and in such cases a rule favorable to the inheritance was applied. In questions between landlord and tenant, the rule was relaxed in favor of the tenant, particularly when trade or manufactures were concerned. In questions between vendor and vendee, and mortgagor and mortgagee, the same rule prevailed as between the heir and personal representatives. In *Walker v. Sherman*, (20 Wend. 636,) the cases are very thoroughly and extensively examined by Mr. Justice Cowen. He arrives at the conclusion, as a general rule, that in order to come within the operation of a deed conveying the freehold, nothing of a nature personal in itself will pass, unless it be brought within the denomination of a fixture, by being in some way permanently, at least habitually, attached to the land or some building upon it; it need not be constantly fastened; it need not be so fixed that detaching would disturb the earth, or rend any part of the building. In the case of *Bishop v. Bishop*, (1 Kernan, 123,) the court of appeals decided that hop poles which had been taken down to gather the hops, and piled in the yard, with the intention of replacing them the next season, were a part of the real estate; and the reason assigned was, that the poles were to be permanently used upon the land, and were necessary for its proper improvement. I apprehend, in this case, it was not intended that every thing necessary for the proper improvement of the land became real estate. Such a rule would convert into real estate a vast amount of property, universally held to be personal. It has been held that stoves used in a house, not attached to the building, were personal property, although there was no other means of warming the house. The house would be worthless, deprived of all means of artificial warmth. A farm cannot be properly cultivated without a team and farming implements; yet it has never been supposed that a team and implements would pass by a conveyance of the farm, to-

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gether with the rents, issues and profits thereof. But title could be acquired to a farm destitute of these articles, as well as to a rail road without engines, cars, &c. I apprehend a rule that all shall pass by a grant, without which, or a substitute for it, the subject of the grant cannot be advantageously improved, is not sound. It would embrace the furniture of houses, as well as articles used upon land. *The Farmers' Loan and Trust Company v. Hendrickson*, (25 Barb. 484,) expressly decides that engines and cars are fixtures. Mr. Justice Strong, in an able opinion, places the decision upon the following grounds: that the wheels are fitted to the rails; that they are used almost exclusively upon the road, and cannot be used elsewhere; that they are not articles of commerce; that the road cannot be used without them. As to the first reason, it may be said, that the engines and cars of the New York and Erie Rail Road may be, and many of them often are, used upon the roads of other companies, having connection with that road; having the same gauge and kind of rail. Before the act providing for the consolidation of several rail road companies into the New York Central Rail Road, the engines and cars of any one of those several companies were suitable, and frequently used, on the entire route from Albany to Buffalo. This shows that engines and cars upon rail roads cannot be regarded as fixtures because they are adapted to use upon the particular road of the company owning them, and not elsewhere. I do not think much force can be attached to the argument that they are not articles of commerce. How the fact may be, I am unable to state, but I think the engines and cars of rail road companies are sold as often as farmers sell or exchange their plows. Plows are procured for use upon a farm, and are very rarely sold and exchanged, unless the farmer ceases himself to cultivate the farm. Should a rail road company at any time have a surplus of engines or cars, I think a ready market would be found for them upon roads similarly constructed. Engines and cars are not attached to the road in any manner save by

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their weight ; they are not kept in any permanent place ; they are run hundreds of miles, passing through different counties and sometimes states. It is well known that the cars of the defendants frequently run upon the New York and Erie Rail Road, to the city of New York, and sometimes the engines and cars of the latter company run upon the defendants' road to Buffalo. When the engines of the New York and Erie Rail Road are on the track of defendants' road, are they the real estate of the latter road ; are they subject to mortgages upon the defendants' road, and to the liens of judgments against the company ? If they are fixtures, I do not see why they would not be. Suppose a party recovers judgment against the New York and Erie Rail Road and docket it in Allegany county, issues execution to the sheriff of that county, and sells the real estate of the company situate therein, what engines and cars will the purchaser hold by virtue of the sheriff's sale ? About one eighth of this road is within the county of Allegany ; how are those fixtures to be divided between the purchaser and the owners of the residue of the road ? Are they to be partitioned according to the length of the whole road, or the value of the different portions ? Again ; suppose the cars are, just at the expiration of the time for redemption, placed upon that portion of the road situate in the state of Pennsylvania ; they are still fixtures, just as much attached to the road as ever. How is the purchaser to proceed ?- He goes to Pennsylvania claiming the cars as real estate ; they are still upon the track of the company ; he interposes his claim to them by virtue of his purchase of the track of the company in the county of Allegany, and claims them as fixtures upon the track. But they are just as much fixtures where they are ; no one has detached the cars from the track. The company ran the cars just where they had a perfect right to run them ; they were from the time of the recovery of the judgment, and still are fixtures. I can hardly believe a proceeding for partition would be sustained ; how then is a judgment to be collected out of the engines and cars

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of a rail road company? Again; the statute provides that the real estate of corporations shall be assessed in the town or ward where the same is situated. In what town or ward are the engines and cars of the New York and Erie, or the New York Central Rail Road Company, to be assessed? They are fixtures just as much in one town as another. Suppose they are assessed in each town and ward through which the track extends; what remedy has the company? I know of none. I believe no attempt has ever yet been made to assess engines and cars as real estate. The leading idea of a fixture is that it is something affixed to land, or to buildings upon the land; something fixed and permanent in its location, or a mere incident to something so fixed. There are exceptions to this rule, some of which have no principle to support them. Upon what principle are deer in a park held to pass by a conveyance of the realty, while cows in a pasture do not; pigeons in a dove cot to pass, while hens in a barn do not? I can see none, except the greater difficulty of removal in the one case, more than in the other. From these cases no general principle can be deduced. A key to a lock in a door passes with the realty; the lock is attached, and the key is held to go with it. The lock is a fixture to the house, not to the farm; so that if the house is conveyed, the key passes with that. I believe no case can be found where real estate has been conveyed by the owner to different persons in severalty. The grantees have been held to be tenants in common of fixtures situate perhaps hundreds of miles from the lands of either. It is true that rail road corporations will have greater facilities for borrowing upon mortgages of their real estate by holding that their engines and cars are fixtures and subject to liens; but I am not aware of any particular necessity for changing rules of law for such a purpose. Government, corporations and individuals appear to have been tolerably successful in borrowing money under existing rules.

➤ In my opinion, engines, cars, &c. are not fixtures, but personal property; and the defendant Patchin acquired a title

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to them by his purchase under the execution against the rail road company. The referee was correct in deciding that the engines and cars were not liable to be sold upon the mortgage.

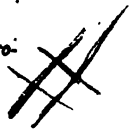
If I am right in this conclusion, then Patchin acquired a perfect title to the property, by his purchase upon the execution. The engines and cars were his, discharged of the lien of the mortgage. That never having been filed as a chattel mortgage, it is void as to judgment creditors, so far as relates to personal property.

The appeal of the plaintiffs should be dismissed, and the judgment modified by omitting the engines and cars from the decree of sale.

MARVIN, J. concurred.

Judgment accordingly.

[ORLEANS GENERAL TERM, September 18, 1858. *Marvin, Greene and Grover, Justices.*]



 BEARDSLEY & KIRKLAND vs. THE ONTARIO BANK and others.

Locomotive engines, and other rolling stock of a rail road company; the stock, materials, rails, ties and other things on hand for running or repairing the road; the platform scales, tools and implements; and all articles not constituting a part of the road bed, or firmly affixed to the land, or some building which is itself a fixture; including such articles as are usually denominated chattels, but which are annexed by a screw or the like to some building, and which can be removed without detriment to the building, are not embraced in, and will not pass by, a mortgage of the *rail road, real estate, chattels real and franchises* of the company; but are subject to execution, as *personal property*.

THIS was an action to foreclose a mortgage, given by the Black River and Utica Rail Road Company to the plaintiffs, as trustees, to secure the payment of bonds to the amount

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of \$1,200,000 issued by the company for the purpose of completing their rail road. The mortgage was executed June 21, 1854, and was in its terms a mortgage of the rail road, real estate, chattels real and franchises of the company. The plaintiffs, in their complaint, alleged a breach of the condition of the mortgage, by the non-payment of the interest due upon the bonds. They further alleged that in August, 1857, the Ontario Bank recovered several judgments against the Black River and Utica Rail Road Company, on which executions had been issued to the defendant Hall, as sheriff of Oneida county, who had levied the same on certain property of the rail road company, consisting of locomotives and tenders, passenger, mail and baggage, freight, platform and gravel cars, snow-plows, materials procured and on hand for renewing and repairing cars &c., engines, machinery, tools in the shops of the company, &c., and articles necessary to the repairing, running and operating the road, and the rolling and other machinery, engines, cars, &c. That a part of the said rail road had been completed, and was in use, at the time of the levy, and the said articles of property, so levied on, were purchased for the purpose and with the intent of using the same on the rail road, and were then so used, and were necessary to the use of the rail road for the purposes designed in the creation of the corporation and in the construction of the road. The complaint further alleged that on or about the first day of September, 1857, the defendant, Edmund A. Wetmore, was duly appointed receiver of the said Ontario Bank, and shortly thereafter, and previously to the first day of November in that year, accepted said appointment and gave the security required of him as such receiver, so that he thereby became invested with all the rights, interest and property, which he was entitled to as such receiver as aforesaid, and the same was duly assigned and transferred to him as such receiver. That the defendants, Edmund A. Wetmore, Alexander B. Johnson, Calvin Hall and the Ontario Bank, claimed that said property so levied on as aforesaid was not, nor was any part thereof;

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embraced in or subject to said mortgage, but that the same and each and every part thereof, was free from any lien, incumbrance or right, created by, or under and in virtue of, said mortgage; whereas, the plaintiffs alleged the contrary, and insisted that said property, and each and every part thereof, was intended to be, and was embraced in and subject to the lien and incumbrance of said mortgage; and that said levy was of no force or effect, as against the lien and incumbrance of said mortgage, and the right thereby created in favor of the plaintiffs, as such trustees as aforesaid. The plaintiffs made no personal demand of any or either of the defendants, except the said rail road corporation, although they claimed that the defendants, the Ontario Bank, and the president thereof, and the said receiver, as well as said Calvin Hall, the sheriff, should be enjoined and restrained from making any sale of the property so levied on, under and in virtue of the judgments, executions and levy aforesaid.

The plaintiffs prayed for a foreclosure of the mortgage; for a sale of the mortgaged premises; and the application of the proceeds of such sale to the payment of the bonds referred to in, and secured by, the mortgage. They also prayed for an injunction and a receiver.

The defendant, The Black River and Utica Rail Road Company, put in an answer, in which, among other things, it insisted that the property levied on by the sheriff was covered by, and subject to, the mortgage of the plaintiffs, as a lien prior to the executions. The attorney of the rail road company afterwards signed a consent by which it was agreed that the plaintiffs might take a judgment for the foreclosure of their mortgage, and for the sale of the mortgaged premises, &c., whenever the controversy between the plaintiffs and the Ontario Bank, and the sheriff, should be determined. The Ontario Bank put in an answer, in which, among other things, they alleged that the judgments, stated in the complaint to have been recovered by the bank against the rail road company, were each duly recovered and perfected as in that behalf in

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said complaint was alleged, and the roll therein filed in the office of the clerk of Oneida county, at the dates in said complaint alleged, and that afterward executions in due form of law upon and for the collection of each of said judgments were duly issued and delivered to the defendant Hall, (who was then and still is the sheriff of Oneida county,) as such sheriff, and that, at or about the time in that behalf in the complaint alleged, the said Hall under and by virtue of said executions, seized, and took into his possession, all the property in the complaint mentioned as having been levied upon, together with all the other property of the defendant, The Black River and Utica Rail Road Company, within the said county of Oneida, and except so far as said property may have been lost, stolen and wasted, the said Hall, as such sheriff, still holds and retains the same, and all thereof, under said levy, and under and by virtue of said executions. And the bank further alleged that each and all of the said property so as aforesaid levied upon, was, prior to, and at the time of the said levy, the property of, and owned by the said defendants, The Black River and Utica Rail Road Company, and was not in any way covered by the said mortgage in the complaint mentioned, and the said mortgage had not been, and was not any lien, incumbrance, or charge thereon, or upon any part thereof, and the plaintiffs had not and have not any right in, lien upon, or claim to the said property so as aforesaid levied upon, or any part thereof, under or by virtue of the said mortgage, or in any other way whatever. And the bank demanded a judgment and decree herein, adjudging and declaring that the property levied upon was not, and is not covered by said mortgage, and that said mortgage was not, and is not any lien, incumbrance or charge thereon, and that the defendants have their costs adjudged to and paid to them.

The action was tried before Judge ALLEN, at Utica, upon pleadings and proofs, in December, 1859, and the following opinion was delivered by him, on giving his judgment therein.

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S. Beardsley, A. Beardsley and E. A. Graham, for the plaintiffs.

F. Kernan, for the defendant.

ALLEN, J. The questions litigated in this action are of that character and importance that they will not be definitely settled until passed upon by the court of last resort; especially in view of the fact, that the decisions of the supreme court upon them are not in harmony with each other. The reasons, therefore, which may control my decision, are not important, and will be stated with more brevity than would be proper if it was supposed they were to influence the judgment or action of the parties in interest. There are two cases in our own courts, directly in point, or at least sufficiently so to control this case; and either would be authority obligatory upon me, were the other out of the way. But as the two are antagonistic in all points, I am left to decide which of the two I ought to adopt as a precedent; or, in other words, to decide the case upon my own judgment, without resting upon the authority of adjudicated cases of the like character in our own courts.

The decisions of the courts of other states, upon the effect to be given to mortgages executed by rail road companies of their property and franchises, would not be entirely safe as precedents, for the reason, if there were no other growing out of the peculiar terms of the mortgages and the laws under which they were executed, that the decisions of the several state courts upon the law of fixtures are not uniform. Differences exist in the rules established by the decisions of the courts in the different states for determining what shall, as between the owner of the freehold and third persons, be deemed a part of the realty, and what personalty, removable as such. Many, perhaps most, mortgages given as this was, embrace and include, in terms, much of the property which is here claimed by the execution creditors of the rail road company to be per-

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sonal and subject to their execution. Such was the case in the two cases referred to, in our own courts, in *Phillips v. Winslow*, (18 B. Mon. 431,) and in *Coe v. Hart*, decided by Judge McLean, and referred to as reported in *Am. Law Reg.* for November, 1857. In *Cary v. The Pittsburgh, Fort Wayne and Chicago Rail Road Company*, referred to by Judge Greene, the mortgage not only included in terms all the property of the company, but that which had been seized by the creditors, or most of it, being rails, had been in use as a part of the superstructure of the road bed, and had been taken up for repair to be relaid again, and the case in that view was directly within the principle by which a mill stone, temporarily removed from its place for sharpening, is held to continue a part of the realty.

The mortgage in this case conveys "all and singular the rail road of the party of the first part, created and constructed, and to be constructed from the city of Utica, in the county of Oneida, and through the county of Lewis to Clayton, in the county of Jefferson, in the state of New York, with the appurtenances thereto belonging; and all the real estate and chattels real, acquired, and now owned by said company, party of the first part, or which shall be hereafter acquired by said party of the first part, situate in the said counties of Oneida, Lewis and Jefferson, together with all and singular the franchises of the party of the first part." It is a mortgage of the "rail road, real estate, chattels real and franchises of the company."

By the rail road is intended the road bed and track, with its superstructure—all that enters into and forms a part of a *completed* road. No more is conveyed under the terms "rail road, real estate and chattels real," than would have been conveyed under a description of the road way and other lands of the company by metes and bounds, with the appurtenances, except as to the after acquired property, which was not at the time of the mortgage susceptible of a description by metes and bounds, or in any other way.

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Under this general description, after acquired property of the company, coming within its terms, would pass. (*Seymour v. Canandaigua and Niagara Falls R. R. Co.*, (25 Barb. 284.) But as a mortgage of real estate, no more would pass than by a description of the same property by metes and bounds; that is, nothing but realty would pass. It matters not whether a mill is conveyed as a mill *eo nomine*, or the land upon which it stands is conveyed by any apt and proper description with the mill upon it. (*Le Roy v. Platt*, 4 Paige, 77.) The question is always, whether the particular piece of property in controversy is, under the circumstances, a part of the land, and if so, is it included in the conveyance, unless expressly excepted. (*Mott v. Palmer*, 1 Comst. 564.) If the property in controversy in this action, when put upon the road and applied to the uses of the company, became a part of the realty, then it is covered by the mortgage, whether acquired before or after the mortgage was given. The mention of the franchises of the company, in the mortgage, does not make that real, which, but for the use of that term, would be personal property, and does not extend the effect or operation of the other terms employed to designate the tangible property intended to be mortgaged. The corporate privileges and powers conferred by law upon the corporation, or rather upon the individuals who are created and made a body corporate and politic, are designated by this term.

Franchises are classed among the incorporeal hereditaments, although they have no inheritable quality. These special privileges, to the extent authorized by law, may be transferred by way of mortgage; but they are not transferable, except in virtue of some statute. But whatever may be the effect of the word in this conveyance, as conferring any right upon a grantee under the mortgage, it is evident that nothing tangible, no corporeal hereditament, is included within or conveyed by that term. Aside from the right of eminent domain, which, to a certain extent, and to enable them to acquire the title to real property, is delegated to rail road corporations, I

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think of no privilege enjoyed by them which might not be exercised by individuals without express permission from the government. The carriage of persons and property, by railway, is a business open to all who can acquire title to the roadway, and construct and equip the road, and the fact that a rail road for the purposes to which they are applied, is deemed to be so far public, or for public purposes, as to justify the delegation of this right of acquiring property upon making just compensation to the owner, without his consent, does not affect the character of the property which a rail road company may acquire.

There is no public policy or public interest involved, which would call upon courts to hold that to be land or a part of the realty, which would not be land owned and used by an individual under the same circumstances. The special privileges of the companies constructing rail roads under a charter or corporate organization, are prescribed and defined by the laws under which they are formed; and none are to be taken by them by implication, or from any real or supposed necessity or public interest, unless the powers are necessary to the accomplishment of the main purpose for which they are incorporated. No powers, and no privileges, other than those expressly conferred or necessarily implied, can be exercised by them. The power to take from the owner, against his consent, upon making compensation, property, which is ordinarily treated and considered as personal, in order to construct or equip the road, would not exist, unless expressly conferred. It does not necessarily result from the power given to take land, and construct and operate a road. So, too, the privilege of holding property as real property, and thus exempt from sale as personal property on executions, which, in other hands, when used for a like purpose, would not be so considered, is not conferred by any statute, and therefore does not exist. If public policy, or the public good, requires a departure from the rules of the common law in the classification of property owned by individuals or corporate proprietors of rail

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roads, it is for the legislature, not for the courts, to make the innovation.

All that the courts can do, is to apply the principles of the common law to new species of property, as they come into existence, and to members and business enterprises as they arise. In this state, courts are admonished, if not enjoined, by the legislature, not to interfere with what of uniformity there may be in the classification of property into real and personal, or add to the exceptions which have already been engrafted upon the general rule by which personal is distinguished from real property. It was deemed essential by the revisers that the same legal character should be given to an article, without reference to the parties in controversy, and with that view the rule was altered as between heir and executor, to the prejudice of the former, to conform to that existing between landlord and tenant, which was the most liberal in favor of holding articles that were not firmly annexed to the realty, to be personal and removable, without the consent of the owner of the freehold. To carry out this view, "things annexed to the freehold, or to any building, for the purpose of trade or manufacture, and not fixed into the wall of a house, so as to be essential to its support," go to the executor and not the heir. (2 R. S. 82, § 6, *sub. 4.* 3 *id.* 2d ed. 639, *App.*)

The rule, as between vendor and vendee, and mortgagor and mortgagee, had been the same, if not taken from that which had existed between heir and executor, and this statute, if it did not work a corresponding change as between those parties, "certainly indicates any thing but a legislative intent to enlarge the rights of freehold." (*Per Cowen, J.* 20 *Wend.* 654.) Johnson, (Ch. J.) of the court of appeals, in speaking of the same statute, says, "When the statute gives a particular species of property to the executor, and gives lands, tenements and hereditaments to the heir, it should be regarded, at least, as furnishing very clear proof that in the legislative mind, that kind of property is considered as not being in any sense included in lands, tenements or hereditaments." (*Murdock*

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v. *Gifford*, 18 N. Y. Rep. 32.) Judge Strong is of the opinion that the common law, as between vendor and vendee, is not altered by that statute. (*Farmers' Loan and Trust Co. v. Hendrickson*, (25 Barb. 489.) The chancellor, in applying and giving effect to the statute, in *House v. House*, (10 Paige, 158,) held that it was still necessary to go back to the common law, to the decisions of the courts, for the purpose of ascertaining what is a substantial part of the freehold, or what is a mere fixture or thing annexed to such freehold. Property of the latter description he would have held as personal, and as belonging to the executor. If the property in controversy here is "annexed to the freehold," either actually or constructively, for the purposes of trade or manufacture, then within this statute it is not subject to the mortgage as real property; if the statute does not apply and control, but simply prescribes a rule of adjudication to cases within the same reason, it would seem the same conclusion should follow. / If not annexed in some way, then it certainly cannot be included in the mortgage as a part of the land.) The property claimed by the mortgagees, in hostility to the judgment creditors of the Black River and Utica Rail Road Company, as included in the mortgage and as a part of the realty, consists mainly in the locomotives and tenders, passenger, mail and baggage, freight, platform and gravel cars, snow plows, materials procured and on hand for renewing and repairing the superstructure of the road and repairing cars, &c., engines, machinery, tools in the shops of the company, and in and about the making and repairing cars, and generally in doing the work of the company, and articles necessary to the repairing, running and operating the road, and the rolling and other machinery, engines, cars, &c. With the exception of the stationary engine and some of the property in the shops of the company, which appear to be annexed in some way to the building and land, a literal reading of the statute would give the property to the execution creditors, as against the mortgagees. The property, if annexed at all, is so annexed

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for the purposes of trade. But as the statute does not in terms embrace the case of vendor and vendee, and may not have been authoritatively decided to apply to that class of cases, although that would seem to be the mind of the court of appeals, the decision may perhaps more properly be placed upon the common law rules. The inquiry will be then, whether the articles seized and claimed by the sheriff, are chattels, fixtures, or a part of the realty. If they are chattels or fixtures, then they were removable, as against the owner of the land, by any one having a claim to them, and were subject to execution against the company as personal property.

The mortgagees occupy the same position that the rail road company would occupy, had there been an attempt to separate this property from the land and sell it as personal property, and no mortgage had been given. If the company in that case could not maintain that it had become and was a part of the land, then the plaintiffs cannot, now. That is, if it is land, as between the mortgagee of the debtor and the execution creditor, then it is as between the debtor and creditor; and yet had the controversy been always between the pursuing creditors and the debtor company, there would hardly have been any conflict in the decisions. That all the articles were chattels personal before they were brought to, and placed upon the road, or the lands of the company, is not disputed; and if they have not by annexation, actual or constructive, lost that character, they must be so treated, for I know of no other way in which personal property can become real and a part of the land; and there may be an annexation without making this change in the legal character of the property. If it is annexed as a mere fixture, then it is removable, and to be treated as personal for all purposes. Fixtures are personal chattels annexed to land, which may be severed or removed by the party entitled to them, against the will of the owner of the freehold. "The term fixtures is one denoting the reverse of its name." The general rule is that all things which are attached to the freehold or annexed to the land, become a

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part of it, if the annexation be made firmly and with an intention that it shall be permanent. Exceptions have been engrafted upon the rule, for the benefit of trade and manufacture, from time to time, and these have been most usually in favor of tenants as against their landlords. Annexation in some form is necessary to constitute that a part of the land which is ordinarily personal property. The annexation in some cases is by gravitation alone, but then the thing so annexed is, in most cases, either a part of some machine, the principal part of which is actually annexed to some building, fastened or let into the soil, or is necessary to complete a building, or to the occupation of the land for the purposes of the trade to which it is adapted and has been appropriated. With a few special exceptions, such as locks, keys, bars, movable shutters, blinds, &c. which are all necessary to complete the building to which they are fitted; charters, deeds, &c., and the box or chest in which they are contained; fish in a fish pond; rabbits, &c., in a warren; deer in a park, &c., which all go with the inheritance as heir looms, and which are considered as annexed and necessary to the enjoyment of an inheritance; chattels in order to lose their characteristics as personal property, must at least be so far fixtures that they are permanent in one place. (The very idea of a fixture is of a thing fixed or attached to something as a permanent appendage, and implies firmness in position.) But that which becomes by annexation a part of the soil is something more than a fixture, and requires at least as much permanence as to constitute a fixture. The maxim, *Quicquid plantatur solo, solo cedit*, which tersely expresses the principle, makes the affixing of the chattel to the soil the test by which it is declared to belong to the soil. (Hence, courts, in determining the questions that have arisen, have looked at the mode and intention of annexation, the object and customary use of the thing annexed, and in determining the intention, the character of the claimant has had its weight.) But fitness and adaptation and intention to annex, without actual or constructive annexation,

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does not make a chattel a part of the realty. A man may have the rafters, doors and windows made to fit precisely his house and the positions they are respectively to occupy, and brought to the ground; but until actually put and affixed in and to the house, and thus made a part of it and the land upon which it stands, they remain personal property. When once attached, they may be removed for temporary purposes without destroying their character as a part of the realty. It would be a vain work for me to undertake that which more able judges have avowed an inability to do, to wit, to review all the cases in which the question has arisen under greatly differing circumstances, and in almost every variety of form, and reconcile the apparent conflict of decisions, and deduce from all a certain rule, easy of application, and to which every case may be made to conform.

It is suggested that the articles claimed under the mortgage passed as incident to and accessory to the principal thing granted, and as a part of the means to obtain it and all the fruits and effect of it. It is well settled that where any thing is granted, all the means to enjoy it and the incidents and accessories pass with it. As by a grant of ground, a grant of way to it; by a grant of trees, the power to cut them; by a grant of mills, the waters, flood gates, and the like, that are of necessary use to the mill. (1 *Shep. Touch.* 89, 90. *House v. House*, 10 *Paige*, 158. *Babcock v. The Western Rail Road Co.*, 9 *Met.* 553.) But divers things, that, by continued enjoyment with other things, are only appendant to others, as warrens, leets, waifs, estrays, and the like, will not pass by the grant of those other things. (1 *Shep. Touch.* 89. *Archer v. Brumul*, 1 *Lev.* 131.) If the thing claimed is a means of enjoyment of the thing granted, as a right of way or other easement over the other lands of the grantor, the only question is whether the right claimed is necessary. If it is claimed as a part of the thing granted, because necessary to the usual and profitable employment of the thing granted, and adapted to its use, the question is whether it is affixed and made a

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substantial part of the freehold, or is a mere annexation for the purpose of trade or manufacture, as in the latter case, it would not be included in the grant. (*Murdock v. Gifford*, 18 *N. Y. Rep.* 28.) Actual physical annexation is not claimed here as to most of the property in controversy, but a constructive annexation resulting from the fitness and necessity of the articles, to the right use of the main thing. The examples given of constructive annexation, which alone will supply the want of actual annexation, are the stone of a mill taken out to pick it; keys, locks, doors, &c., sails of a wind mill, windows, &c. (*Grady's Law of Fixtures*, 15.) These examples take the place of a definition, in terms, of a constructive annexation, and the chattels which become realty by constructive annexation must belong to the same class or come within the reasons which control in such cases. "They must be such as go to complete the building or machinery which is affixed to the land, and which, if removed, would leave the principal thing incomplete and unfit for use." In order to pass as an accessory of that which is confessedly realty, it would be accessory to it, and not to a matter of a personal nature. A fire engine was considered as an accessory to the carrying on of the trade of getting and vending coals from the land, a matter of a personal nature, and therefore is not a part of the realty. (*Lawton v. Lawton*, 3 *Atk.* 13. *Lord Derby v. Lord Ward*, 1 *Amb.* 13.) The carrying of passengers and freight is a matter of a personal nature, to which, and not to the rail road as realty, the "locomotives, cars, &c., are accessory." C. J. Shaw, in *Winslow v. Merchants' Ins. Company*, (4 *Met.* 314,) after speaking of the difficulty of laying down a general rule, says, "In general terms, we think it may be said that where a building is erected, as a mill, and the water works of steam works, which are relied upon to move the mill, are erected at the same time, and the works to be driven by it are essential parts of the mill, adapted to be used in it and with it, though not at the time of the conveyance, attachment or mortgage, attached to the mill, are yet parts of it, and pass

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with it by a conveyance, mortgage or attachment." In the same case it was decided that all articles of stock, such as iron and coal, and all materials to be wrought, and the hand tools and all implements not driven by the steam engine, and articles not annexed to the building nor embedded in the ground, nor *constituting parts* of such mill, were to be deemed personalty, and not realty. This is, I think, the extent of the rule of constructive annexation. Broom, in his *Legal Maxims*, page 190, says, "It is not sufficient that the article in question merely rests upon the soil, or upon such foundation; unless there be annexation, no difficulty can under any circumstances occur." Lord Mansfield held that salt pans, put in salt works by the ancestor, went to the heir as part of the inheritance, and not to the executor. He put the decision upon the ground that the owner erected them for the benefit of the inheritance, and could never have intended to give them to the executor. These salt pans were fixed with mortar to a brick floor, and there were furnaces under them. (*Lawton v. Salmon*, 1 *H. Black.* 259 *in notes*.) This has been called a mixed case of an erection, for the benefit of trade, as well as of the inheritance, and effect was sought to be given to the intent of the owner. The cases of *Farrar v. Stackpole*, (6 *Greenl.* 157,) *Voorhees v. Freeman*, (2 *W. & S.* 116,) and *Pyle v. Pennock*, (*Id.* 300,) so far as they dispense with annexation of chattels to the soil or building, as an essential requisite to change the character of a personal chattel, and make such change to depend upon the fitness and adaptation of the article to the purposes for which the real estate is used, are opposed by the decision of our own courts. Perhaps they may be reconciled to our decisions, but not upon any principle which could affect this case. The American editor of *Smith's Leading Cases*, is of the opinion that the doctrine of the Pennsylvania court must prevail, if at all, by its own authority, since in all the cases in which chattels have been elsewhere treated as fixtures, there has been some annexation, although in some instances slight in its character, to the pre-

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mises on which they were placed. (2 *Smith's Lead. Cases, Law Lib. ed.* 169, *top paging*.) The cases of water wheels, mill stones, running gear and bolting apparatus of a grist and flouring mill, which in *House v. House*, (*supra*,) were held to be constituent parts of the mill, is not an exception to the rule requiring some annexation. The frame work and foundation upon which the water wheel rests, and upon which it turns upon its axle, is necessarily a part of a building, or embedded in the soil, and that and the wheel are made for each other, and both are parts of the completed building and essential to it, and all the gearing connected with it form a part of the same machinery. It all has a permanent and fixed position. It is stationary, not movable, in one place to-day and another to-morrow; and see *Le Roy v. Platt*, (4 *Paige*, 77.) While rails, before made into a fence, are personal property, when in a fence attached to the land, they become a constituent part of it, as do hop poles, although temporarily removed from the ground to gather the crops. But in both cases they are deemed attached to the land. (*Mott v. Palmer*, 1 *Comst.* 564. *Bishop v. Bishop*, 1 *Kern.* 123. *Goodrich v. Jones*, 2 *Hill*, 142.)

There are peculiar reasons why fences should be deemed a part of the freehold, without regard to the particular mode of their attachment to the soil. Immemorial custom, if nothing else, would make a fence, whether a Virginia fence or a fence actually embedded in the soil, a part of the realty. Fences have always, and by universal consent, passed with the land, as much as the houses upon it. But not so as to the rolling stock of a rail road. There is no such custom, and in a grant of a rail road with its stock a careful conveyancer would schedule the rolling stock, and grant it as such. *Walker v. Sherman*, (20 *Wend.* 636,) is a leading case in our own courts, and after a full review of the reported cases, it was held that the parts of a machinery belonging to another party, which were not in any manner affixed or fastened to the building, or to the land, was personal and not real property. The general

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rule to be deduced from that case is, that whatever its use or object, unless the thing be physically annexed to the freehold in some way, it will not pass under a grant of the land from vendor to vendee, while the cases of constructive annexation, where the article is seldom or never corporeally attached to the realty, are few, and may be set down as exceptions to the general rule. (*Id.* 646, *per Cowen, J.* *Whiting v. Braston*, 4 *Pick.* 311.) The Virginia fence, and manure in the barn-yard, are placed among the exceptions. *Murdock v. Gifford*, (18 *N. Y. R.* 28,) reaffirms and applies the doctrine of *Walker v. Sherman*, and holds that looms in a woollen factory, connected with the motive power by leathern bands, not otherwise annexed to the building than by screws holding them to the floor, which kept them steady while working, and which could be removed without injury to themselves or to the building, are chattels, and not a part of the realty. If that case was well decided, (and it was well considered, and at least is binding upon me,) then but little of the property in controversy here was or is a part of the realty, and covered by the mortgage. The looms are distinguishable from the cars and rolling stock of the rail road in this, that they were permanently placed, although not strongly affixed, while the rolling stock of the road was incapable of permanence, or of being affixed or annexed in any one place, but was intended for locomotion. Its whole use is in its locomotive facilities. The term by which it is ordinarily designated, "rolling stock," implies the very reverse of annexation and a permanent fixture. It is essential to the successful operation of the rail road, but not a part of the rail road itself. It is an accessory to the trade and business of the road, and not to the road itself. The road is completed when the bed is graded, the superstructure laid, the rails put down, and every thing is ready for the reception of the locomotives and cars; it is equipped when the rolling stock and all other necessary appliances and facilities for business are finished and put upon it for use. The company can then commence the trade of carrying pas-

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sengers, to which the cars are necessary and accessory. The road and its equipments are as distinct as the store of the merchant and the stock of goods upon the shelves. I concur fully in the manuscript opinion of GREENE, J. in *Stevens v. The Buffalo and N. Y. City R. R. Co.*(a) presented me. The locomotives, therefore, and all the other rolling stock of the company—all the stock, materials, rails, ties, and other things on hand for running or repairing the road, the platform scales, and all the loose tools and implements levied upon, and all the articles not constituting a part of the road bed, or firmly affixed to the land or some building which is itself a fixture, including such articles as are usually denominated chattels, but which are annexed by a screw or the like to some building, and which can be removed without detriment to the building—were properly seized by the sheriff. The steam engine, with the boiler and machinery connected therewith, and making a part of it and necessary to it as an engine, is real property, and subject to the mortgage. (*Richardson v. Copeland*, 6 Gray, 536.)

Judgment will be given accordingly, to be settled in detail upon a further hearing of the parties as to particular articles claimed by them respectively.

[OHIO SPECIAL TERM, December 27, 1859. Allen, Justice.]

(a) Reported, ante p. 590.

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A chose in action owned by an individual at the time of his death, belongs to his personal representatives, after his decease; and his widow has no authority to assign the same, in the absence of any proof that she is executrix or administratrix of her husband.

There is no legal presumption that a widow occupies the relation of personal representative of her husband.

Where a defendant claims as a set-off an account alleged to have been assigned

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to him, he must prove that the same was assigned before the commencement of the suit.

Where a cause before a justice of the peace is submitted by the counsel, at the close of the evidence, with an agreement that within the four days in which the court is to render judgment they will appear before the justice and argue the cause, the case is in effect postponed for a final hearing to the fourth day; and the justice has a right with, or without the consent of the parties, to take four days from that time, for the decision of the cause. And whether the justice, on the day of the summing up, will or will not receive further evidence, is a matter wholly within his discretion, and the exercise of such discretion will not be reviewed by the supreme court, on appeal.

Whether the act of the legislature, of April 10, 1855, creating the office of justice of the peace of the village of Medina, and clothing the incumbent with the same jurisdiction, in civil and criminal cases, as justices of the peace of the several towns of the state is unconstitutional and void? *Quare*. Although, as an original question, it might be difficult to sustain the authority of the legislature in such cases, yet it seems the principle is settled, in favor of the right, by the court of appeals, in *Bill v. The Village of Corning*, (15 N. Y. Rep. 297.)

THIS was an action commenced before D. W. Cole, esquire, justice of the peace of the village of Medina. This office was created by an act of the legislature of the state of New York, passed April 10, 1855, (*Sess. Laws of 1855, ch. 285, §§ 2, 27,*) and under that law Cole was elected and assumed to act as justice of the peace.

The plaintiff's complaint was upon a promissory note for \$23. The answer admitted the execution of the note and also interposed the plea of set-off, as follows: An account of \$11.88 against the plaintiff, and in favor of Alonzo Mason, which had been assigned to the defendant. Also another account against the plaintiff and in favor of Reuben Garter, of \$57, which had been assigned to the defendant.

On the trial the evidence established the Mason account, and showed that Mason was the owner at the date of his death, and that his widow had, subsequent thereto, assigned the same, for a valuable consideration. The evidence also tended to show that the said account was to be paid in jewelry, and that the plaintiff had ever been in readiness to pay it in that way.

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The Garter account was for services as counsel for the plaintiff, about the rendition of which there was no dispute, but the evidence was conflicting as to the mode of payment; some evidence being given to show that the services were rendered under an agreement for payment in jewelry, which was in conflict with the evidence of Garter, the assignor of the account, on that point. The evidence in the case further showed that the action was commenced, and the assignment of the Garter account to the defendant was made, on the same day. After the evidence was closed, the counsel for the respective parties submitted the cause to the justice, with an agreement that within the four days in which the court was to render judgment they would appear before the justice and argue the cause. On the fourth day thereafter the counsel for the parties appeared and the defendant's counsel then offered to introduce further evidence in the cause, which was objected to by the counsel for the plaintiff, and excluded by the court. The cause was then argued, whereupon the court stated to the counsel for the parties, "that questions of law had arisen that he had not thought of before the argument and he would like further time." The counsel for both parties consented that the court take four days additional time in which to render judgment, within which time the court rendered a judgment in favor of the plaintiff, and against the defendant, for \$27.50 damages and costs, which on appeal was affirmed in the Orleans county court. From the judgment of the latter court an appeal was taken and the record brought up for review in this court.

Reuben Garter, for the appellant,

De Puy & Bowen, for the respondent.

By the Court, DAVIS, J. I have examined the return in this case carefully, and do not think any of the points arising upon the proceedings during the trial well taken. The *Mason*

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account belonged to Mason's legal representatives. There is no evidence that Mrs. Mason was his executrix or administratrix, and there is no legal presumption that she occupied either of those relations to the estate of her deceased husband. There was no evidence, therefore, showing any authority in her to transfer the account, and hence the title of the defendant to it wholly failed. The evidence tended to show, also, that it was payable in jewelry, and that the plaintiff had held himself in readiness to pay it in that way. From the evidence on this subject the justice would certainly have been warranted in finding that the plaintiff had not acted in good faith; still it was not so entirely clear that we can say he was not justified in finding the other way.

As to the Garter account, it is obvious it was disposed of upon a question of fact arising from conflicting evidence. The justice probably found that it was, by the express terms of the contract, payable in jewelry, and that there had been no default on the part of the plaintiff. The evidence was sufficient to sustain that conclusion. Besides, it did not satisfactorily appear that the account was in fact assigned to the defendant before the commencement of the suit. This was a fact for the defendant to establish affirmatively.

The rejection of the evidence offered on the day of the summing up is not error. It was wholly in the discretion of the justice whether to receive the evidence at that time or not, and we cannot review his exercise of that discretion. In this case there was certainly no abuse of discretion.

The objection that the judgment was rendered more than four days after the submission of the cause is not well founded, in fact. The case was in effect postponed for a final hearing to the day when the counsel appeared and argued it, and the justice had an undoubted right with or without the consent of the parties to take four days from that time.

The point most relied on in the case is as to the jurisdiction of the justice. It is claimed that the act authorizing the election of a justice of the peace in the village of Medina and

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clothing him with the same jurisdiction in civil and criminal cases as justices of the peace of the several towns of this state, is unconstitutional and void. This question was not raised before the justice himself, and there is therefore nothing whatever in the case to base it upon, except that the justice commences his return by saying, "I, Darius W. Cole, a justice of the peace of the village of Medina in said county [of Orleans] do hereby certify and return," &c. It is very questionable whether this is sufficient to show that Mr. Cole is the justice of the peace which the charter of the village of Medina authorizes the citizens of that village to elect. He may be, consistently with this description, a justice of the peace of one of the towns in which that village is situated, in which case the words "of the village of Medina" would be operative only as a designation of his place of residence. We should hesitate, therefore, to reverse this judgment on the ground urged, because the appellant has not given us in the return satisfactory evidence that the justice before whom this case was tried is the one whose jurisdiction is obnoxious to the objection now made. But assuming that the justice in this case was elected under the charter of the village of Medina, and derives his jurisdiction therefrom, we are not prepared to hold that the act authorizing his election and conferring his power is unconstitutional. The question is a grave one, and by no means free from doubt. As an original question I confess it seems to me very difficult to sustain the authority of the legislature in such cases, but I consider the question in effect settled by the court of appeals in the case of *Sill v. The Village of Corning*, (15 N. Y. Rep. 297.) That case, it is true, was not entirely analogous to this in its facts, but I do not see on what ground it is justly distinguishable in principle. If under the constitution the legislature can create in incorporated villages local courts of inferior civil and criminal jurisdiction, I do not discover any sound reason why they may not measure that jurisdiction by the standard of authority conferred on justices of the peace of the several towns.

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There is nothing in the point made by the respondent, that this court has not jurisdiction to entertain appeals in cases of this character.

The judgment should be affirmed.

[ERIE GENERAL TERM, November 28, 1859. *Greene, Marvin and Davis, Justices.*]

VOLNEY OWEN, receiver, &c. of the Herkimer Manufacturing Company, vs. WILLIAM SMITH and others.

Upon the dissolution of a corporation the title to real property held by it does not revert to the original proprietors and grantors, or their heirs, but vests in the receiver of the corporation; and the property, real and personal, of the corporation, is to be administered by him for the benefit of creditors and stockholders.

The rule of the common law, in relation to the effect of a dissolution, upon the property and effects of a corporation, is a harsh and inequitable rule, and it *seems*, has never been, to the fullest extent, adopted and acted upon as the rule in this country; at least so far as the extinguishment of debts is concerned. And the rule was changed, in this state, by the act of April 9, 1811, for the relief of the creditors of corporations. (1 R. L. 248. 1 R. S. 600, §§ 9, 10.)

THIS case comes before the court upon an agreed statement of facts, under § 372 of the code. "The Herkimer Manufacturing Company" was incorporated by special act of the legislature, in 1833, "for the purpose of erecting a dam across West Canada creek in the town of Herkimer, in the county of Herkimer, at some convenient point northwardly from the village of Herkimer, and to conduct the waters of the said creek in such canal as they may construct near to the said village, and to discharge the same into the Mohawk river or West Canada creek, or both, at such place or places as they shall deem most convenient, thereby to create water power for driving all kinds of machinery; and to carry on the manufacture of cotton and woolen goods and machinery, or either

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of them separately, and to dispose of such water power as shall not be used by them." (*Laws of 1833, ch. 165.*) In 1833 and 1834 the ancestors of the defendants, by deed duly executed, conveyed to two of the associates named in the act of incorporation, certain premises in the town of Herkimer, described in the conveyance. Such conveyance was made to enable the company to carry out the enterprise contemplated, and with a view to the public benefit of the contemplated work, and also for a moneyed consideration, and conveyed the premises to the grantees in fee, in trust and upon the condition, 1st. That the waters should, within three years, be diverted and conducted as contemplated; and 2d. That the lands conveyed should be used and occupied by the grantees, their heirs or assigns, for the purpose of constructing upon and through the same the necessary and proper works connected with the proposed diversion of the waters of said creek, or for the purpose of building lots." In May, 1836, after the complete organization of the company, the lands were conveyed to it, subject to the same conditions, by the grantees in the deeds named, to have and to hold to the said company, "its successors and assigns, fully, freely, absolutely and forever." The charter of the company expired by its own limitation in April, 1853, and the plaintiff was appointed receiver of its property and effects. The defendants have entered upon and been possessed of the premises as heirs at law of the original grantors and owners, and claim title thereto, as such heirs, upon the ground that upon the dissolution of the company the title to the real property reverted to the original proprietors; and this question of property and right of possession is submitted, by the agreement of the parties, for the decision of the court.

V. Owen, plaintiff, in person.

B. Earl, for the defendant.

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By the Court, ALLEN, J. No question is made in respect to the conditions of the conveyances to the corporation as expressed in them. It is conceded that these conditions have been substantially performed, so that there is no right in the grantors or their heirs as for conditions broken. Neither is it claimed that the grant was for a special purpose, and that such purpose having failed the title has reverted to the grantors. The grants were in fee, and vested the title absolutely in the corporation so far as it could take. A corporation can take a fee simple for the purposes of alienation, but at common law only a determinable fee for the purposes of enjoyment. (*Angell & Ames on Corp.* § 195. 2 *Kent's Com.* 282.) The only question is as to the effect of the dissolution upon the title to real property held by the corporation at the time it ceased to exist as a corporation. It is claimed that the common law rule is in force in this state, and the real property reverted to the original proprietors and grantors, or their heirs, and that the title to the premises in question vested, upon the expiration of the charter of the Herkimer Manufacturing Company, in the defendants as heirs at law of the grantors. In case of a dissolution or civil death of a corporation, in England, its personal property vests in the king, all its real estate, remaining unsold, reverts back to the original grantor or his heirs, and the debts due to and from the corporation are extinct. (*Angell & Ames on Corp. sup. Id.* § 779. 2 *Kent's Com.* 307.) This is a very harsh and inequitable rule, and I doubt if it has ever been to the fullest extent adopted and acted upon as the rule in this country; at least so far as the extinguishment of the debts is concerned. It certainly has not been favored by the courts, or by legislatures. The supreme court of the United States has decided that the creditors of a corporation, after its dissolution, might enforce their claims against any property not passed into the hands of bona fide purchasers, but is still held in trust for the corporation or the stockholders thereof at the time of its dissolution. (*Mumma v. The Potomac Company*, 8 *Pet.* 281.

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Curran v. The State of Arkansas, 15 How. 304.) Judge Curtis in the last case says, "Whatever technical difficulties exist in maintaining an action at law against a corporation after its charter has been repealed, in the apprehension of a court of equity there is no difficulty in a creditor following the property of the corporation into the hands of one not a bona fide creditor or purchaser and asserting his lien thereon, and obtaining satisfaction of his just debts out of that fund specifically set apart for its payment when the debt was contracted, and charged with a trust for all the creditors when in the hands of the corporation; which trust the repeal of the charter does not destroy." The same learned judge also cites with approval the note to page 307 of 2 *Kent's Com.* to the effect that "the rule of the common law has in fact become obsolete. It has never been applied to insolvent or dissolved moneyed corporations, in England. The sound doctrine now is, as shown by statutes and judicial decisions, that the capital and debts of banking and other moneyed corporations constitute a trust fund and pledge for the payment of creditors and stockholders, and a court of equity will lay hold of the fund and see that it be duly collected and applied." (See also *Houghton v. Thornton*, 8 Geo. Rep. 491.) *Angell & Ames*, in the 5th edition of their treatise on corporations, § 779 a, say: "The rule of the common law in relation to the effect of a dissolution upon the property and debts of a corporation has in fact become obsolete and odious. Practically it has never been applied in England to insolvent or dissolved moneyed corporations; and in this country its unjust operation upon the rights of both creditors and stockholders of this class of corporations is almost invariably arrested by general or special statute provisions. Indeed, at this day, it may well be doubted whether, in the view at least of a court of equity, it has any application to other than public and eleemosynary corporations, with which it had its origin. The sound doctrine of equity is that the capital, or property, or debts due to banking, trading, or other moneyed corporations, constitute a

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trust fund pledged to the payment of the dues of creditors and stockholders." It will be seen that the term "moneyed corporation" is not used in the above quotations in the restricted sense given it by 2 *R. S.* 598, § 51, but includes all corporations created with a view to the pecuniary profit of the copartners.

The legislature of this state quite early, and in less than a month after the passage of the act authorizing the incorporation of manufacturing corporations, took means to remedy the gross injustice of the common law rule, and if the word "property" as used in the act passed with that view, included real as well as personal property, the common law rule was by it abolished, and the equitable rule contended for by Judge Curtis and Angell & Ames established in its place. The act was passed April 9th, 1811, (1 *R. L.* 248,) and was re-enacted in the revision of 1830. (1 *R. S.* 600, §§ 9, 10.) It is to the effect that upon the dissolution of any corporation, unless other persons shall be appointed by the legislature or other competent authority, the directors or managers of the affairs of such corporation shall be the trustees of the creditors and stockholders of the corporation dissolved, with full power to settle the affairs of the corporation, collect and pay the outstanding debts, and divide among the stockholders the moneys and other property that shall remain after the payment of the debts and necessary expenses. It is claimed that this act only reaches the personal property and effects of the corporation owned by it at the time of its dissolution, and that the rule of the common law still applies to the real property, and that it reverts to the original grantors, as before. But there is nothing in the act to restrict the term to personalty, and the equity of the creditors and stockholders is the same in respect to all species of property. In some corporations as manufacturing corporations, as in the corporation in question, the principal if not the entire property may be in realty, and there is no reason why that should be confiscated from the stockholders, any more than the personal property of a defunct

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banking corporation should be taken from its stockholders. The time of the passage of the act would seem to indicate that protection to creditors and stockholders in manufacturing corporations was chiefly in the mind of the legislature, at the time of its passage, and in that case real property would not have been excluded. The term property must be deemed and taken to have been used in its general and popular sense, and so used it includes both lands and chattels. (*Bouvier's Law Dic. h. t. Soulard v. The United States*, 4 Pet. 511. *Jackson v. Housel*, 17 John. R. 281.) Chancellor Walworth, in an opinion delivered by him in the court for the correction of errors, in 1835, in the case of *Ducro v. Spriggs*, not reported, says: "The statutory provision, although rather obscure in its terms, evidently was intended to reach the real as well as the personal property of the extinct corporation, and was probably passed with particular reference to the real and personal estate of manufacturing companies who had been authorized to incorporate themselves under the general act passed a few days before." Chancellor Kent takes the same view of the case, and says: "This is a just and wise provision, and gets rid altogether of the inequitable consequences of the rule of the common law;" (2 *Kent's Com.* 308, note c;) and in *James v. Woodruff*, (10 *Paige*, 541, affirmed 2 *Denio*, 574.) A statute of New Jersey in all respects similar to this received a construction, in *McLaren v. Pennington*, (1 *Paige*, 102,) and it was held that the common law was changed by it, and all the property of the corporation vested in trustees for the benefit of creditors and stockholders. (*See per Chancellor at page 111.*) *Nicoll v. The New York and Erie Rail Road Co.*, (12 *Barb.* 460, 2 *Kern.* 121,) did not consider the construction of the act, or the effect of the dissolution of a corporation upon its property. What is said by Parker, J. in the supreme court, and again in the court of appeals, was merely incidental and by way of illustration, and the learned judge had not in his mind the act, and of course did not intend to

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pass upon its construction or effect. *Bingham v. Weiderwax*, (1 *Comst.* 509,) is liable to the same remark, but the judge (Jewett) speaks cautiously, and the head note contains the substance of his remark: "It seems that on the dissolution of a corporation, the title to real estate held by it reverts back to its original grantor, and his heirs, unless there is some provision in the charter, or some other statutory provision to avert that consequence."

It would seem from the qualification, that the learned judge supposed that there was a legislative provision in this state to "avert the consequences" of the common law rule. *People v. Mauran*, (5 *Den.* 389,) and *Aikin v. Albany, Vermont and Canada Rail Road Co.*, (26 *Barb.* 289,) decided other and entirely different questions. The construction of this act was not considered at all by the court in either case. *Flyn v. Chase*, (18 *Pick.* 63,) may be properly cited as evidence of the leaning of courts in favor of the equities of creditors and stockholders of dissolved corporations. It was held in that case that under a statute providing that corporations might be continued bodies corporate for the term of three years after the expiration of their charter, for the purpose of settling their concerns, but not for the purpose of continuing the business for which they were established, a bank was authorized, immediately before the expiration of such term of three years, to indorse a note held by it, to trustees appointed to wind up the affairs of the bank, and vested by it with all the powers of the corporation. Wilde, J. says: "This is a just and wise remedial law, and ought to be liberally expounded." "The object of the statute was effectually to guard against the inequitable consequences of the rule of the common law." So too, our own statute is a remedial statute, having the same object in view, and should receive the same liberal exposition. By it the common law rule was changed and the property real and personal of an extinct corporation administered for the benefit of the creditors and stockholders. The title to the

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real as well as personal estate of the Herkimer Manufacturing Company vested in the receiver, and did not revert to the original grantors.

The plaintiff is entitled to judgment with costs.

[ONONDAGA GENERAL TERM, April 3, 1860. *Allen, Mullin and Morgan*, Justices.]

MARGARET BROUER vs. O. VANDENBURGH.

Where money belonging to a husband was delivered by his wife to the defendant, to be by the latter applied to a special purpose, viz. the payment of the interest due upon the husband's bond and mortgage held by the state, and receipts were given by the defendant, acknowledging that he had received the money of the wife for the purpose named; *Held* that the wife was to be deemed as acting as the agent of her husband, who was the proper person to sue for the money, and that an action would not lie in the name of the wife.

THE plaintiff brought this action to recover certain moneys claimed to have been deposited by her with the defendant, for a special purpose, to which the defendant has failed to apply them. At the time the moneys were received by the defendant, the plaintiff was the wife of Aaron Brouer, who owned and occupied a farm in Madison county which was incumbered by a mortgage to the state, given by him as collateral to his bond, and the money in question "was acquired out of said farm and its products in its usual management," and was delivered to the defendant to be by him transmitted to the proper officer, in payment of interest due on the said bond and mortgage of Aaron Brouer. The defendant, with a single exception, gave receipts acknowledging to have received the money of the plaintiff, for the purpose named, and in the exceptional instance he acknowledged to have received the money of John Brouer, a son of Aaron Brouer and the plaintiff. Aaron Brouer was indebted to the defendant to an

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amount exceeding the moneys received by the latter, and died indebted to the defendant.

The action was tried before a referee, who gave judgment for the plaintiff for the full amount claimed, and from that judgment the defendant appealed.

O. Vandenburg, appellant, in person.

Davis & Leach. for the respondent.

By the Court, ALLEN, J. The judgment cannot be sustained. The money received by the defendant was confessedly the money of Aaron Brouer, the husband of the plaintiff, and was to be applied by the defendant in discharge of Aaron Brouer's obligation, and for his benefit. There was no contract to account for the money to Mrs. Brouer, the plaintiff, as in *Borst v. Spelman*, (4 Comst. 284.) There could have been no gift of the money to the wife, as the purpose to which it was dedicated was entirely inconsistent with the idea that the money had been given to the wife. The wife acted as the agent of her husband in the transaction, and he, and he alone, was entitled to call the defendant to account for the money. (*Freeman v. Orser*, 5 Duer, 476. *Gates v. Brower*, 5 Seld. 205. *Switzer v. Valentine*, 4 Duer, 96.)

The receipts are not conclusive, as to the ownership of the money. They were merely admissions in writing of a fact, and susceptible of any explanation not inconsistent with the contract contained in them, as to the appropriation of the money. (*Ide v. Sadler*, 18 Barb. 32. *Blossom v. Griffin*, 3 Kernan, 575, per *Johnson, J.* *Barry v. Ransom*, 2 id. 462.) There is nothing of the character of an estoppel, in the transaction. The plaintiff has not relied upon or been induced to act on the faith of any representations or admissions of the defendant, as to the ownership of the money. All the facts were within her personal knowledge. If the receipts are conclusive, then the referee erred in allowing to the plaintiff the

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amount admitted to have been received of John Brouer. If the plaintiff had owned the equity of redemption in the mortgaged premises there might have been some slight evidence upon which the referee could have found a gift of the money by the husband to the wife. But she did not own the estate until some time after this transaction. The referee has not found, and the evidence would not have authorized a finding, that the money had been given to the plaintiff by her husband, or that it had in any way become her separate property. He did decide that the receipts of the defendant were *prima facie* evidence, and in the absence of any proof to the contrary, showed that this money belonged to the plaintiff. The learned referee had forgotten the admission that the money was earned by the husband upon his own farm, and was to be applied to the payment of his debt, and that the plaintiff was thus shown to be acting as the agent of her husband. It is quite evident that a recovery by the plaintiff would not bar a recovery by the representatives of her husband.

The judgment must be reversed, and a new trial granted; costs to abide the event.

[ONONDAGA GENERAL TERM, April 8, 1880. *Allen, Mullin and Morgan*, Justices.]

LUDDEN vs. HAZEN.

Although the law tolerates a separation of the apparent from the real ownership of chattels in some cases, when the honesty of the transaction is made to appear, yet when the purposes for which the possession of property is delivered to a buyer are inconsistent with the continued ownership of the vendor, the transaction will be presumed fraudulent as against purchasers and creditors. The form of the transaction will be deemed to be colorable, and the title be held to have vested, absolutely, in the buyer.

H. purchased of the plaintiff a quantity of liquors for the purpose of stocking an unlicensed grocery, and gave a receipt therefor, specifying that the same were to remain the property of the seller until paid for; the liquors to be paid for when sold, or returned when called for. *Held* that the transaction

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could not be upheld as a conditional sale; that by the contract of sale and the delivery of the liquors to H. to make a part of his stock in trade and to be retailed to his customers, the property vested in him, and became liable for his debts.

THE plaintiff brought trover, before a justice of the peace, for parts of two barrels of whisky and part of a keg of gin, seized and taken by the defendant as a constable, on an execution against one Hackett. The plaintiff claimed title as owner, and that the liquors were part of a large quantity which he had sold conditionally to Hackett, to become his when paid for. The residue of the liquor had, prior to the levy, been sold by the defendant at retail, contrary to law. The judgment under which the defendant justified was in favor of the commissioners of excise, for a violation of the excise law. The justice gave judgment against the defendant for the value of the liquors, and the county court of Oswego county affirmed such judgment on appeal, and the defendant appealed to this court.

W. & L. J. Sanders, for the appellant.

Cromwell & Munn, for the respondent.

By the Court, ALLEN, J. The running of an unlicensed grocery upon borrowed whisky is a new expedient by which a party may violate the laws and avoid pecuniary responsibility, and calls for a novel application of the doctrines incident to conditional sales of personal property. That personal property may be sold and delivered under an agreement for the payment of the price at a future day, and the title by express agreement remain in the vendor until the payment of the purchase price, is now well settled. Such payment is strictly a condition precedent, and until performance the property does not vest in the buyer. This is one of the cases in which the law tolerates a separation of the apparent from the real ownership of chattels, when the honesty of the transaction is made

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to appear. But when the purpose for which the possession of the property is delivered to the buyer is inconsistent with the continued ownership of the claimant, the transaction will be presumed fraudulent as against purchasers and creditors. The form of the transaction will be deemed to be colorable, and the title held to have vested absolutely in the buyer. The principles of *Griswold v. Sheldon*, (4 Comst. 591,) as announced by Judge Bronson, are entirely applicable to a case of that character. That was the case of a mortgage of a store of goods, in which it was contemplated that the mortgagor should continue his business as a trader, and sell the goods as he had opportunity, to his customers, and deal with them in all respects as if he were the absolute owner; and Judge Bronson is of the opinion that the mortgage could not stand as against purchasers or creditors. (And see *Urlick v. Smith*, 1 Camp. 332; *Paget v. Perchard*, 1 Esp. 205.) It is true that the court was divided in opinion, in *Griswold v. Sheldon*, upon the question whether the mortgage was void in law, but all agreed that the circumstance referred to was evidence of fraud. But in the case of a mortgage, the security is on file and the public have constructive and may have actual notice of it, while in the case of a conditional sale or delivery, there is nothing to inform the public that the apparent owner is not the actual owner. So that in the case of a conditional sale the dealing with the property, with the consent of the seller, in a manner utterly inconsistent with his rights as owner, would be much stronger evidence of fraud than in the case of a mortgage. The cases agree that if the condition is merely colorable, with intent to defraud, and protect the property from creditors, it is void. (Per Nelson, Ch. J. in *Strong v. Taylor*, 2 Hill, 326; per Bigelow, J. *Coggell v. Hartford and New Haven Rail Road Co.* 3 Gray, 545; per Wilde, Ch. J. *Barrett v. Pritchard*, 2 Pick. 512.) The justice having, upon the evidence, found that the sale was conditional, that fact must be considered as established, although the resort to a fraudulent document, by the plaintiff, to support his title, cast suspicion upon

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the whole case. The document got up with a view to the suit after the levy by the defendant, and which the plaintiff swears explains the agreement made at the time, is a receipt signed by Hackett, the defendant in the execution, in these words :

“ *Camden, March 5, 1859.*

Received of Martin Ludden 2 bbls. of whisky, each 42 gal-	
lons, 84 in all, at 30 cts. per gallon,	\$25 20
10 gallons gin, at 10/	12 50
2 empty barrels, each 8/	2 00
2 empty kegs, each 8/	2 00
	<hr/>
	\$41 70

The above gin to remain the property of said Ludden until paid for, said gin to be paid for when sold, or returned when called for. (Signed) WILLIAM HACKETT.”

A literal reading of the receipt would only entitle the plaintiff to demand a release of the goods on the failure of Hackett to pay for them when sold, which would be rather late, as then the title would have vested in the purchaser. But the receipt contemplates a sale of the goods by Hackett, and the evidence shows that it was understood that the liquors were bought by Hackett to start a grocery and to be retailed to the customers. The retaining of the renewed ownership by the plaintiff was a mere farce, and could have served no honest purpose. It is evident that Hackett was not to sell as agent of the plaintiff, or on commission, but was to deal with the goods as his own, the title, as against creditors and purchasers, vesting in Hackett absolutely.

But the principle of conditional sales, aside from the fraud, which is very apparent, will not uphold such sale when the property is to be delivered to the buyer for consumption or for sale, or to be dealt with in any way inconsistent with the ownership of the seller, or in a manner which would necessarily destroy his lien or right of property. The buyer is in all other cases treated as a lessee or bailee, and with only the rights which would attach to lessees or bailees. In *Herring v.*

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Willard, (2 Sand. S. C. R. 418,) the article sold was an iron safe, and Oakley, Ch. J. said it was exactly the case of leasing personal property with an agreement to sell it at a future time on receiving a stipulated price, and then adds: "It is not the case of an article placed in the hands of one who keeps similar articles for sale, as goods deposited with a merchant or trader." Thus indicating the distinction which would exclude this case from the principles relied upon. *Strong v. Taylor*, (*supra*,) was the case of a canal boat. Nelson, Ch. J. lays stress upon the fact that the buyer was "to use the boat for the purpose of paying for it in pursuance of the terms agreed on." He was not at liberty to deal with her as his own. *Barrett v. Pritchard* was the case of a sale of wool to be manufactured by the buyer, and the manufacturer neither destroyed the wool nor its identity, and hence the sale was consistent with the continuing of the lien or ownership of the seller. The judge says, "The creditors of King [the purchaser] had no reason to believe him the owner of the wool, unless they were informed of the sale; for the possession of it for the purpose of manufacturing was an evidence of property." Can the same be said of whisky dealt out at a grocery? In *The Dresser Manufacturing Company v. Waterston*, (3 Metc. 7,) the printing cloths which were the subject of the sale were delivered to the buyer to be printed and forwarded to a third person, whose acceptance was to be given on payment; a disposition entirely consistent with the seller's lien. The cloths were printed and going forward as theirs, and the fact is remarked upon by the judge in giving the opinion of the court.

This transaction cannot be upheld as a conditional sale. By the contract of sale and the delivery of the liquors to Hackett to make a part of his stock in trade and to be retailed to his customers the property vested in him and became liable for his debts. The judgment of the county court and of the justice must be reversed.

[ONONDAGA GENERAL TERM, April 8, 1860. *Allen, Mullin and Morgan*, Justices.]

WILLIAM VALENTINE and others *vs.* HARLOW C. WETHERILL
and others.

31b	655
37	Mis'596

81b	655
39	Mis'420

V. died intestate, in 1840, seised of certain real estate in fee, leaving him surviving a widow, and three children, to wit: H., C. and A. The widow married H. C. W., and by him had one child, H. W., who was still living and under age. The widow died in 1853. A. died in 1845, intestate and under age. H. was married to T. W. and by him had one child, and died in 1853, under the age of 21 years. The child afterwards died. C. died in 1856, unmarried and under the age of 21 years. In 1852 the premises were sold by order of the county court, upon the petition of the infants, H. and C., and the proceeds of the sale were brought into court. The plaintiffs claimed this fund as the brothers and sisters of V., the original owner, to the exclusion of H. W. the daughter of V.'s widow by the second marriage, and the claim of T. W. as tenant by the curtesy, in the share of H.

Held, 1. That at the time of the death of C. the whole fund had vested in her, not as personalty, but as realty; the fund continuing to be real estate, of the same nature as the property sold.

2. That one third of this she owned by descent directly from her father, and to the other two thirds she acquired title by descent from her brother and sister, H. and A., who took the same as heirs at law of their father.
3. That as to the one third derived by C. directly from her father, and as his heir at law, the plaintiffs were entitled to it, under the statute, inasmuch as the estate came to her by descent from her ancestor; and that H. W. not being of the blood of that ancestor, was excluded.
4. That the other two thirds came remotely or indirectly and by intermediate descent, from the same source, but it formed no part of the ancestral inheritance. That as to that portion the descent from H. and A. to C. was direct and immediate, and the latter took as their representative, and not as the heir of V. their common ancestor.
5. That H. W., the half sister, inherited immediately from the intestate, and was entitled to those two thirds of the estate.
6. That H. W. and T. W. were necessary parties to a suit brought for the purpose of having the rights of the several claimants of the fund determined.

A PPEAL from the judgment of JOHNSON, J. at special term, declaring the rights of the respective parties to moneys in court, the proceeds of a sale of real estate of infants. F. H. Valentine died intestate in 1840, seized of the premises in fee, leaving him surviving a widow and three children, to wit: Hannah E., Catharine L., and Ananias.

The widow married Harlow C. Wetherill, and by him had

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one child, Harriet Wetherill, who is now living and under age, but who is not a party to the suit. Harlow C. Wetherill is a party as her guardian. The widow died before the commencement of this suit, and about March, 1853. Ananias Valentine died intestate and under age in 1845. Hannah E. Valentine was married to Theodore Wetherill, and by him had one child, born living, since deceased, and died in 1853, under the age of 21 years. Catharine L. Valentine died in 1856, unmarried and under the age of 21 years.

The premises were sold in 1852, under the statute, by the direction of the county court of Cayuga county, and upon the petition of the infants, Hannah E. Valentine and Catharine L. Valentine, and the fund in court was realized upon such sale. The plaintiffs claim as the brothers and sisters of the original owner F. H. Valentine, to the exclusion of the half sister of Catharine L. Valentine and the claims of Theodore Wetherill as tenant by the curtesy in the share of Hannah E. Wetherill. The court, at special term, gave judgment for the plaintiffs, and declared them entitled to the whole fund.

C. Andrus, for the appellant.

S. R. Cox, for the respondent.

By the Court, ALLEN, J. There is a want of parties which will prevent this judgment being final in any respect. The suit was only necessary because of the adverse claims to the fund. But for them the court would have directed the payment of the moneys to the claimants, upon their *ex parte* petition. An action became necessary because other parties made claims to parts of the fund, and upon these claims questions not free from difficulty arise—questions which could not properly be settled upon a summary proceeding by petition. A formal adjudication, and the judgment of the court in a formal action, was considered, and properly considered, essential to the final determination of the rights of the claimants.

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The court so adjudged, on giving the parties their costs out of the fund. And yet the only adverse claimants making any thing like a plausible demand upon the fund are omitted as parties. If their claims are to be passed upon at all they are necessary parties. If their claims were so entirely unfounded as not to merit consideration, an action should not have been brought. The appellant, as guardian for the infant claimant as of the half blood of the last owner, was made a party as such and as representing the infant. But a decree against him as guardian does not bind the infant, and the surviving husband of Hannah E. Valentine was not made a party in any form. The suit is defective, and it does not cover the defect to say that on the judgment of the court the claims of the parties omitted cannot be sustained. Upon that question they are entitled to be heard. The defendant Harlow C. Wetherill has been treated by the plaintiffs as representing his infant ward, and they cannot now object to his right to appeal. The case, and the record, came up in an irregular form, and the record is almost without form, but enough appears to show this defect of parties. It was the duty of the court to order the parties named to be brought in. (*Code*, § 122.) For the reason that the judgment will not bind either Harriet Wetherill, the half sister of Catharine L. Valentine, or Theodore Wetherill, who claims as a tenant by the curtesy, the judgment should be reversed, to the end that they may, by proper proceedings, be brought in as parties and have the opportunity to assert their title.

But if the claims of these parties were before us, upon this record, I should be of the opinion that they were well founded; especially that of the half sister. At the time of the death of Catharine L., who died in 1856, under age and incapable of making a will of real estate, the whole fund had vested in her, not as personalty but as realty. For all the funds continued to be real estate of the same nature as the property sold. (2 *R. S.* 195, § 110. *Shumway v. Cooper*, 16 *Barb.* 556. *Foreman v. Foreman*, 7 *id.* 215; *S. C.* 1 *Ker.*

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544.) One third of this she owned by descent directly from her father ; the other two thirds she acquired title to by descent from her brother and sister, who took the same as heirs at law of their father. The original source of title was the father, and if it is necessary that the person taking by descent from Catharine L. should be of his blood, then the half sister cannot take, as she has none of his blood, being the daughter of his widow, by a subsequent marriage. As to the one third derived directly from the father and as his heir at law, by Catharine L., there can be no question. The plaintiffs are unquestionably entitled to it, under the statute. The estate came to Catharine L. by descent from her ancestor, and Harriet Wetherill, not being of the blood of that ancestor, is excluded. (1 R. S. 753, § 15.)

The total exclusion of the half blood from the inheritance is almost peculiar to the common law, and was founded on reasons peculiar to the English tenures, and grew out of the feudal system. The difficulty of tracing the descent from the first feudatory compelled a departure from the strict proof which the rule would have required and the substitution of a more simple rule of evidence, and at common law even it is necessary that the claimant be next of the whole blood to the person last in possession, (or derived from the same couple of ancestors.) (2 Bl. Com. 228.) This rule does not secure any greater certainty that the estate will go to the heir of the first purchaser than if the half blood of its last possessor were allowed to inherit. (*Id.* note 29.)

So that it is in truth a rule of evidence and not a rule of descent. The exclusion of the half blood is looked upon as a hardship, and as no necessity growing out of our tenures exists for its continuance, it has been abrogated, except in the case provided for by statute, and perhaps some exceptional cases not provided for by the express provisions of the act regulating descents. In this state with others there is no distinction between the whole and the half blood, as to descents from brothers and sisters, except in the case of ancestral in-

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heritances. (4 *Kent's Com.* 403, 4.) The law has continued without change in this respect, since 1786. (1 *R. S.* 53, § 3.) The principle was extended by the revised statutes. (1 *id.* 753, § 15. 3 *id.* 2d ed. 604, *Revisers' Notes.*)

There was no father or mother to inherit from Catharine, and the estate consequently descended to her collateral relatives, and first to her brothers and sisters if any were living, or to the descendants of such as had died. (1 *id.* 752, §§ 7, 8.) By § 15 it is declared that relatives of the half blood shall inherit equally with them of the whole blood in the same degree, unless the inheritance came to the intestate by descent, devise or gift of some one of his ancestors; in such case all those who are not of the blood of such ancestor shall be excluded from such inheritance.

Unless the exception in the 15th section excludes the half sister of Catharine, and this section must be read in connection with §§ 8 and 9, as showing who are brothers and sisters capable of inheriting as of the blood of the last possessor, the plaintiffs cannot claim under §§ 10, 11 and 12, which only provide for a descent to the paternal or maternal relatives in case there be no heir entitled to take under the preceding sections. The one third of the estate did come from the ancestor (the father) of Catharine, and as to that, Harriet Wetherill, the half sister, is excluded. The other two thirds came remotely or indirectly and by intermediate descent, from the same source, but it formed no part of the ancestral inheritance. It came to the intestate by descent from her collateral relatives, to wit, her brother and sister. The term "ancestor" is used in its proper sense, in the statute, and designates the immediate not the remote source of the intestate's title. It is not equivalent to the expression "the parent or other kindred of the intestate," as used in the statutes of Rhode Island. "Ancestors," derived from *antecessores*, designates the ascendants of the intestate in the right line, as father and mother, grandfather and grandmother, and does not include collateral relatives as brothers and sisters. (2 *Bouv. Inst.* 355. *Bouv.*

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Law Dic. 2 *Bl. Com.* 209.) Chancellor Kent recognizes the distinction between "ancestral and collateral" inheritances, and considers the distinction between whole and half blood, which is substantially abrogated or confined to the former. (4 *Kent's Com.* 404.) The descent from Hannah and Ananias to Catharine was direct and immediate, and the latter took as their representative and not as the heir of their common ancestor. (*McGregor v. Comstock*, 3 *Comst.* 408.) In *Brown v. Burlingham*, (5 *Sand. S. C. Rep.* 418,) it is decided that the rule of the common law that on the descent of a newly purchased inheritance the blood of the father is to be preferred, is not applicable when the descent is to brothers and sisters, or their descendants, and that the rule was in fact abolished in every case of descents for which the statute provides. The statute looks only to the last possessor of the inheritance, and does not refer to the original source of title, or to him who was last in as purchaser. *Gardner v. Collins*, (2 *Pet.* 58,) arose under a law of Rhode Island similar and the same in substance with our own statute, and the case is on all fours with this. The Rhode Island statute is, "When the title to any estate of inheritance, or to which the person having such title shall die intestate, came by descent, gift or devise from the parent or other kindred of the intestate, and such intestate die without children, such estate shall go to the kin next to the intestate of the blood of the person from whom such estate came or descended, if any there be." John Collins demised the estate to his daughter Mary Collins in fee. Mary Collins intermarried with one Gardner, and on her death the estate descended to her three daughters, two of whom died intestate, and the survivor, Mary C. Gardner, became seised of the whole estate and died in 1822. It was held that two thirds of the estate descended to the children of Gardner, the husband of Mary Collins, by a former wife, being brothers and sisters of the half blood of Mary C. Gardner. This case is recognized in *Beebe v. Griffing*, (4 *Kern.* 235,) as giving the construction of a statute of descents as applicable to the laws

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of this state as to those of Rhode Island, in reference to which it was made. The half sister inherits immediately from the intestate, and is entitled to two thirds of the estate.

The judgment must be reversed and the case remitted, with leave to the plaintiffs to amend their complaint by adding parties as they shall be advised. The costs to abide the event and final order of the court.

[ONONDAGA GENERAL TERM, July 8, 1860. *Allen, Mullin and Morgan*, Justices.]

HENRY BUMSTEAD, *appellant*, vs. ARBA READ and WILLIAM BUMSTEAD, *respondents*.

Where a judicial tribunal has general jurisdiction of the subject matter of the controversy or investigation, and the special facts which give it the right to act in a particular case are averred and not controverted upon notice to all proper parties, jurisdiction is acquired, and cannot be assailed in any collateral proceeding.

Where the judicial tribunal has not general jurisdiction of the subject matter, under any circumstances, no averment can supply the defect; no amount of proof can alter the case; no consent can confer jurisdiction.

Where the judicial tribunal has not *general* jurisdiction of the subject matter, but may exercise it under a particular state of facts, those facts must be specially averred and established; and when so established on a hearing of all proper parties, cannot be impeached in any collateral proceeding.

Where, upon an application to a surrogate for probate of a will and for letters testamentary thereon, the residence of the testator, at the time of his death, in the county of such surrogate, is plainly averred in the petition, and is not in any way controverted but is substantially admitted by all the parties interested in the will, and is practically established upon sufficient evidence, as a fact, by that tribunal, that court has jurisdiction of the case; its determination is conclusive, as to the validity and probate of the will, and cannot be examined or assailed in any collateral proceeding, or in any other tribunal of original jurisdiction.

THIS was an appeal from the decree of the surrogate of Saratoga county, refusing to admit to probate in that county the last will and testament of Thomas Bumstead, deceased.

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On the 11th day of April, 1855, the testator, Thomas Bumstead, died at the city of Troy, in the county of Rensselaer and state of New York, leaving no widow, but leaving the respondent William Bumstead, and Stephen Bumstead of Troy, and the appellant Henry Bumstead of Charlton, and Mary Maxon of Brooklyn, his children, and divers grandchildren, sons and daughters of his said children, who were and are his only heirs at law and next of kin, and leaving a will by which, among other things, he gave certain portions of his property to his executors therein named, of whom the respondent Arba Read was one, in trust for the said Henry and Stephen Bumstead and Mary Maxon, and certain other portions thereof to the said William Bumstead and the children and heirs at law of the said Henry and Stephen Bumstead and Mary Maxon; which will afterwards, on the 11th day of June, 1855, upon the application of Arba Read to the surrogate of the county of Rensselaer, and the written request therefor and consent thereto of the said Henry, William and Stephen Bumstead, and after due citation and notice to them, and to the respective persons, heirs and next of kin aforesaid of the testator, and on due proof to authorize its probate by said surrogate, was duly proved before him, and letters testamentary thereon granted by him to the said Arba Read, who thereupon qualified and has since acted as the sole executor thereof. The petition so presented by the said Arba Read to the surrogate for the proof of the will was duly verified, and described the testator as of the city of Troy in the county of Rensselaer; and in addition to the other matters necessary or proper to be stated therein, alleged and showed the making of said will by him, his subsequent death at the city of Troy in said county, and his residence at the time of his death at and in said city and county; and the citations issued thereon by said surrogate and served on said Henry Bumstead and said other persons, also described the testator as of the city of Troy; and neither Henry Bumstead nor either of said other persons, who appeared at the time and place of proving the will before the

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surrogate, in pursuance of said citations, in any way or manner disputed the same, or that the residence of the testator at the time of his death was at Troy, or objected to the proof of said will or the granting of letters testamentary thereon to the said Arba Read by the surrogate, but on the contrary thereof expressly requested and consented to the same. On the 23d day of July, 1857, thereafter, the said Henry Bumstead presented to the surrogate of Saratoga county, a petition for the proof of said will before said surrogate, which petition was duly verified and was similar to that previously presented by Arba Read to the surrogate of Rensselaer county for the proof of the will before him as aforesaid, except as to the place of residence of the testator at the time of his death, which it alleged was at the town of Charlton in said county of Saratoga, and prayed for a citation and subpoena, which were issued by said surrogate and served on said Arba Read and William Bumstead and the others to whom the same were directed. At the time appointed for the proof of said will before the surrogate of Saratoga county, the said Henry and William Bumstead and the said Arba Read appeared before said surrogate. Henry Bumstead produced and presented to the surrogate for probate, the said will with a certificate in due form made and signed by the surrogate of the county of Rensselaer attached thereto, and stating and showing the due and previous probate of said will by and before said surrogate of Rensselaer county, and offered to prove the death of the testator and his execution of said will, and that at the time of his death he was an inhabitant of said county of Saratoga. Arba Read and William Bumstead opposed the same, and objected to the jurisdiction of the surrogate and to his entertaining the application, for the reason that the will had already been duly admitted to probate by the surrogate of Rensselaer county, as appeared by the will itself presented. And also that it was proved before and admitted to probate by the surrogate of Rensselaer county, on the request of the proponent, Henry Bumstead, and upon due proof to authorize its probate before

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the surrogate of Rensselaer county; and to sustain said objection presented and offered to read exemplified copies of the petition, consent, citations, papers and proceedings aforesaid, upon and for the proof of said will before the surrogate of Rensselaer county. Henry Bumstead objected to the reading of said papers or either of them at that stage of the case, or to show the facts stated in the objection. The surrogate overruled the objection, and Henry Bumstead excepted to his decision. The said exemplified copies were then given in evidence by Arba Read and William Bumstead. And the surrogate thereupon made and entered an order or decree denying the proof and probate of the will and the prayer of Henry Bumstead's petition for the proof and probate thereof. From this decree the proponent appealed to this court.

W. A. Beach, for the appellant.

J. Romeyn, for the respondents.

By the Court, HOGEBOM, J. The question to be determined in this case is one of *jurisdiction*; whether the surrogate of Rensselaer county had jurisdiction to take proof of the will of Thomas Bumstead deceased. No doubt, upon the petition presented to the surrogate of Saratoga, considered without reference to the other proceedings, he had jurisdiction to take proof of this will; but this *prima facie* case is met by proof showing that, previously, upon a petition in all respects similar, except that it showed that the residence of the testator at the time of his death was in Rensselaer and not in Saratoga, to which and the proceedings consequent upon it the appellant and all other proper persons were made parties, the surrogate of Rensselaer assumed jurisdiction of the case, necessarily decided the jurisdictional question of residence, and admitted the will to probate as that of a man who at the time of his death resided in the county of Rensselaer. The question of residence was before him; all proper parties were cited;

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they had a right to take the objection that the testator did not reside in Rensselaer; they omitted to do so; and their voluntary omission is equivalent in legal effect to taking the objection and having it decided against them. The surrogate passed upon the question; no appeal was taken from his decision; and I think the question is at rest.

It is now sought to be reviewed collaterally. It is claimed to be purely a jurisdictional question and one touching the subject matter, and not merely the person, and therefore open to contestation in a collateral proceeding.

This alleged jurisdictional question is the question of residence—the residence of the testator at the time of his death; the appellant claiming it to be in the county of Saratoga, the respondents in the county of Rensselaer.

It is unquestionably an elementary principle—perhaps a universal one—that unless a court, and more especially one of special and limited jurisdiction, entertaining judicial proceedings, acquires jurisdiction of the subject matter of the controversy, its proceedings are void, and present no bar to subsequent proceedings before another and a proper tribunal.

It becomes necessary, therefore, at the outset, carefully to inquire what is meant by jurisdiction of the *subject matter*, and how it may be acquired. By jurisdiction, as applied to judicial proceedings, is meant the right to act—the lawful power to hear and determine. A court has jurisdiction of the subject matter, when it has the legal right to sit upon the case and determine it. This right, it is obvious, may be derived from various sources; from the very constitution of the court and the nature of the controversies which from time immemorial it has been in the habit of hearing and determining, or from legislative enactment. In this case the tribunal in question derives its power from the legislature.

The taking proof of wills is a marked and peculiar attribute of surrogates' courts; and in a certain sense surrogates' courts may be said to have general jurisdiction of that subject; in some cases exclusive jurisdiction; in others, concurrent juris-

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diction with other courts. In these courts more than in any other—more than in all others combined—is the proof of wills made. And I think this consideration is not without some force in determining its jurisdiction in a particular case.

A particular surrogate's court, however—the surrogate of a particular county—has exclusive jurisdiction to take proof of the wills of all persons residing in that county at the time of their decease. And thus the question of residence or inhabitancy is an important, a vital element in conferring jurisdiction. I am not entirely clear, however, that on this point it may not be said to be jurisdiction rather affecting the *person* than the *subject matter*. It is true the testator is dead, and it may be said no jurisdiction of his person can be obtained; but in a certain and in a legitimate sense he may be said to be in court through his *representatives*. And if *all* his representatives of every description, his executors, heirs at law and next of kin, all *consent* to the jurisdiction of a particular tribunal—there being no other person to object—may it not be said, in a strictly proper sense, that the court has obtained jurisdiction of the *person* of the testator, or of his representatives? Suppose it were possible that the last will and testament of a party might be proved in his lifetime, at the instance of an executor or a legatee, and upon citation to the testator and others; suppose further, that the test of the surrogate's jurisdiction was the residence of the testator at the time of making the will; that at such time the testator resided or claimed to reside in the county of Saratoga, but actually executed the will in the county of Rensselaer, and had been living or staying in the latter county for some time preceding, so that a plausible question might be raised as to which was the county of his residence at the time of making the will. If, on proceedings taken by the executor to prove the will in the county of Rensselaer upon the ground that that was the county of his residence, neither the testator nor any other person, on being cited, should object to the jurisdiction on the ground that the testator actually resided in Sara-

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toga, would they not be precluded, would not the surrogate of Rensselaer acquire jurisdiction, and would not such jurisdiction be conclusive? Could it not be said, and properly said, the surrogate has jurisdiction of the *subject matter*, to wit, the taking proof of wills, and has acquired jurisdiction of the *person*, by service of citation and non-objection, or *consent* of the parties served—for consent confers jurisdiction of the person—and thus that the determination of the surrogate, unless reversed on appeal, is *conclusive*, and in nowise impeachable in a collateral proceeding. It strikes me, therefore, that the question of *inhabitaney* is properly classed under the head of those cases which treat of the jurisdiction of the *person*, rather than of those which relate to the *subject matter*.

But assume this to be strictly a question respecting *subject matter*, then how does the question present itself. There are many cases where the want of jurisdiction would be at once and clearly apparent upon the face of the proceedings. Thus if an action for slander or assault and battery were brought in a justice's court, or in a surrogate's court, the want of jurisdiction would be instantly apparent, and no consent could confer it, because the legislature has forbidden it. The *subject matter* of the controversy is wholly outside of the range of subjects upon which those tribunals can adjudicate; and I think the judgments would be absolutely void, and the persons concerned in enforcing them trespassers; and that a new action for the same cause might instantly be commenced in the proper tribunal. But this is by no means true in the case before us. The taking proof of wills is a proper subject for the action of a surrogate's court. It is true also, that to entitle a particular surrogate to take proof of a particular will, the testator must have resided in his county at the time of his decease. How is the fact of such inhabitaney to be ascertained? It must in some way be made to appear. In this case, as was proper, it was shown in a *verified* petition, and not controverted. The surrogate passed upon the question.

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He had a right, nay was bound, to do so. There was legitimate and sufficient evidence upon which he came to the conclusion that the testator resided in the county of Rensselaer. It is not the case of a palpable lack of proof, or of evidence plainly contradicting such a position, in which case it is possible it might be held that the proceedings would be declared void in whatever form the question would be presented. (*Lewis v. Dutton*, 8 How. Pr. R. 103, and cases there cited.) There is no known method of establishing a fact in a court of justice except by proof or admission. And whenever a fact is litigated, the court settles it in a particular way, and then the fact is established, and all parties concerned in the litigation, are concluded by it; and this is so of *jurisdictional facts* as well as of any other. (*Vanderpoel v. Van Valkenburgh*, 2 Selden, 199.) When, therefore, in this case, the surrogate's court of Rensselaer county had determined that the testator, at the time of his decease, resided in Rensselaer county, it became a *fact* in the case, as to that will, and as to all persons who are parties to the proceedings. The question could not be re-examined, except upon a direct review or appeal. It could not be brought in question in any collateral proceeding. It has been even questioned whether such a determination could be impeached, even if the testimony upon which it was founded was subsequently shown to be clearly mistaken or perjured. (*Dyckman v. Mayor of New York*, 1 Seld. 443.) And it seems to me such is the correct rule. In what other way can courts act? *Interest reipublicæ ut sit finis litium*. What warrant have we for saying that the second court of original jurisdiction will determine the jurisdictional question any more correctly than the first? Both are liable to be mistaken; but there must be some point at which controversy must cease; and the general, if not universal, rule is, that it shall cease (except for purposes of review or appeal in a direct proceeding) whenever any competent tribunal has once passed upon a matter in issue, after hearing all parties interested. Let us test the rule on the proper course of proceeding

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by the case in hand. The appellant alleges, and offers proof of the fact, that the testator, at the time of his decease, resided in the county of Saratoga. If the proof is admissible, the respondent is of course entitled to controvert it. It must then be determined in the ordinary way. And when determined, if determined in favor of Saratoga, would it be quite certain that the last determination would be correct, and the former incorrect? But it is said the fact exists, one way or the other: the testator did or he did not reside in the county of Rensselaer, and the jurisdiction of the surrogate depends upon that fact. Concede it, and how is the fact to be made known to a judicial tribunal, except by evidence; and when so made known and determined by the court upon a hearing of the parties, it becomes a fact in the case, forever thereafter incontrovertible in a collateral proceeding.

Without further pursuing this train of thought, my impressions upon the question of jurisdiction are as follows:

1. Where the judicial tribunal has general jurisdiction of the subject matter of the controversy or investigation, and the special facts which give it the right to act in a particular case are averred, and not controverted, upon notice to all proper parties, jurisdiction is acquired, and cannot be assailed in any collateral proceeding. (*Vanderpoel v. Van Valkenburgh*, 2 Seld. 190. *Jackson v. Robinson*, 4 Wend. 436. *Jackson v. Crawfords*, 12 id. 533. *Davis v. Packard*, 6 id. 327. *Gorgnon v. Astor*, 7 How. U. S. Rep. 319. *Sheldon v. Wright*, 7 Barb. 39; S. C. 1 Seld. 497.)

2. Where the judicial tribunal has not general jurisdiction of the subject matter under any circumstances, no averment can supply the defect; no amount of proof can alter the case; no consent can confer jurisdiction. (*Borden v. Fitch*, 15 John. 141. *Bigelow v. Stearns*, 19 id. 39. *Dudley v. Mayhew*, 3 Comst. 9. *Coffin v. Tracy*, 3 Caines, 129. *Davis v. Packard*, 7 Pet. 276.)

3. Where the judicial tribunal has not general jurisdiction of the subject matter, but may exercise it under a particular

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state of facts, those facts must be specially averred and established, and when so established on a hearing of all proper parties, cannot be impeached in any collateral proceeding. (*Lewis v. Dutton*, 8 *How. Pr. R.* 99. *Miller v. Brinkerhoff*, 4 *Denio*, 119. *Matter of Faulkner*, 4 *Hill*, 598. *Staples v. Fairchild*, 3 *Comst.* 41. *Harman v. Brotherson*, 1 *Den.* 537. *Field v. McVickar*, 9 *John.* 130. *Erwin v. Lowry*, 7 *How. U. S. Rep.* 172. *McCormick v. Sullivan*, 10 *Wheat.* 192. *Dyckman v. Mayor &c. of New York*, 1 *Selden*, 434.)

The result is, that as the residence of the testator in the county of Rensselaer was plainly averred in the petition for probate in the surrogate's court of that county, and was not in any way controverted, but substantially admitted by all parties interested in the will, and was practically established, upon sufficient evidence, as a fact, by that tribunal, that court had jurisdiction of the case; its determination was conclusive as to the validity and probate of the will, and could not be re-examined or assailed in any collateral proceeding, or in any other tribunal of original jurisdiction.

The decree or order appealed from was therefore proper, and must be affirmed with costs.

[ALBANY GENERAL TERM, December 5, 1869, *Wright, Gould and Hogeboom*, Justices.]

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A

ACTION.

4. An action cannot be maintained, in the courts of this state, to enjoin and restrain the prosecution of an action commenced and pending in a court of a sister state. *Williams v. Ayrault*, 364
2. A plea of a suit pending for the same matter, in a foreign state, or country, is no bar to an action here, either in equity or at law. *ib*
3. The *exceptio rei judicata* applies only to final judgments abroad, upon the merits of the action. *ib*
4. An action to recover the debt to secure which a mortgage is given, or even to foreclose a mortgage, and an action to compel a party to surrender a mortgage, to be canceled and discharged of record, are different actions entirely, and were never regarded or held to be actions for the same matter. *Per Johnson, J.* *ib*
5. No action will lie against another to recover damages for a personal injury, where it appears that the carelessness and imprudence of the plaintiff contributed to the injury. *Spooner v. Brooklyn City Rail Road Company*, 419
6. Thus, where the plaintiff, with knowledge that an omnibus sleigh, belonging to the defendant, was full of passengers, stopped the same, and voluntarily and deliberately placed himself upon the fender, on the outside of the sleigh—a place not made or intended for passengers, but designed as a defense to the sleigh—although warned by a fellow passen-

ger of the danger of the position, where he was injured by a collision with another vehicle; *Held* that whatever might have been the misconduct of the defendant in other respects, the plaintiff was guilty of gross imprudence and misconduct himself, which either caused or contributed to the injury; and that he could not recover damages for such injury. *ib*

7. A purchaser of lands sold for taxes or assessments, in the city of Brooklyn, cannot maintain an action against the city, to recover moneys paid to the collector of taxes and assessments by other persons, for the use of the plaintiff, and for the purpose of redeeming such lands from the tax sale, and which moneys the collector has refused to pay over to the plaintiff, on demand made. *SCRUGHAM, J. dissented. Onderdonk v. City of Brooklyn*, 505
8. The collector acts as a public officer, in receiving the redemption money, upon sales of that nature, but not as the agent of the city. *ib*

See BANKS, 2, 3, 4.

BROOKLYN, CITY OF, 4.
DEATH BY WRONGFUL ACT, &c.
HUSBAND AND WIFE, 4, 11.

ADVANCEMENTS.

See SURREGATE.

AGREEMENT.

1. Equity has no authority to make, for parties, a contract which they never entered into. And where the relief sought is to reform a contract, that can only be granted by making

the contract as both parties intended to make it. Unless it clearly appears that both parties agreed together, as the plaintiffs allege they did, the plaintiffs cannot have the relief asked for. *New York Ice Co. v. North Western Ins. Co.* 72

2. An agreement between a banking corporation, located in Wisconsin, and commission merchants and factors in the city of New York, by which the former is to consign produce to the latter for sale on commission, against which drafts are to be drawn, and to keep the drawees in funds to meet the same, in cases where consignments are not made, is not necessarily illegal, in the absence of any thing to show what powers are possessed by the bank, by virtue of its charter. *Perkins v. Church*, 84

3. An agreement was made between the plaintiff and the defendant, a rail road company, by which the former was to convey to the latter a strip of land adjoining the rail road, and by which he agreed to erect upon his own lands, cattle yards, and pens for stock, &c. for shipping and transferring the cattle, &c. to and from the cars; to provide for feeding the stock; and to build a house to entertain the drovers &c. in charge of the stock. In consideration of which the defendant agreed to construct a rail road track, on its own land, alongside of the plaintiff's land, and to run its stock trains of cars over said track, and stop at certain places, and deliver to the plaintiff, upon his land, all the stock that was to be transported eastward, and to receive and load them there; to the end that the plaintiff might enjoy the profits to arise from keeping and feeding the stock. It appeared that the business contemplated by the contract could not be done without connecting the lands of the plaintiff with those of the defendant, by means of a platform or bridge resting partly upon the land of each party. *Held*, 1. That the contract, if valid, in effect created an easement or servitude which was to be binding upon the real property of the defendant, as the servient tenement, for the benefit of the plaintiff and his land, and those who should succeed the plaintiff in his real es-

tate. 2. That the negative easement acquired by the plaintiff in the lands of the defendant, by virtue of the agreement, was an incorporeal hereditament, the right or title to which could only pass by grant, or deed under seal, or be acquired by prescription; and that the contract in this case, being by parol, was void. 3. That the agreement, being oral, was void by the statute of frauds, because, from its nature and terms it was not to be performed within one year, but was to continue in operation, as a permanent arrangement, during the existence of the corporation. *Day v. New York Central Rail Road Company*, 548

See PHYSICIAN.
SUNDAY, 2, 3.
WORK AND LABOR.

ALIENS.

See CITIZENSHIP.

ANSWER.

See PLEADING, 1, 2.

ARREST.

See SHERIFF, 1.

ASSESSMENTS.

For Streets. See BROOKLYN, CITY OF, 1 to 5.
On premium notes. See MUTUAL INS. COMPANIES.

ASSIGNOR AND ASSIGNEE.

Where a defendant claims as a set-off an account alleged to have been assigned to him, he must prove that the same was assigned before the commencement of the suit. *Heidenheimer v. Wilson*, 686

ATTACHMENT.

1. Under the code, the duties, upon attachments, which were formerly discharged by the trustees of the debtor's estate, now devolve on the sheriff, who is required to collect the debts due to the debtor; and he is entitled to the same measure of

compensation which the revised statutes awarded to trustees, for the like services, viz. all necessary disbursements, and a commission of five per cent on all moneys which come into his hands. *Mayhew v. Duncan*, 87

2. If the sheriff chooses to employ agents to aid him in collecting debts, which he could himself collect without resort to an action or the employment of attorneys or counsel, he must himself compensate his agents; unless an agreement is made by him with all parties interested in the proceeds. *ib*

3. It seems that the sheriff may employ attorneys and counsel, and prosecute actions; and that he is entitled to be paid the necessary disbursements therefor, in the same manner that such disbursements were allowed to trustees under the attachment authorized by the revised statutes; whether the action be successful or not, if it be prosecuted in good faith. *ib*

4. In an action brought under the old practice, upon a bond given on an application being made to a justice of the peace, for an attachment against property, the defendant may, under the plea of *non est factum*, prove, in mitigation of damages, that the property was sold by a constable, and a portion of the proceeds applied by him to the payment of an execution issued in another suit. *Bennett v. Brown*, 158

5. Where, upon the issuing of an attachment, by a justice of the peace, a bond is given, conditioned that if the applicant fails to recover a judgment the obligors shall pay all damages and costs which the obligee may sustain by reason of the issuing of the attachment; and the applicant recovers a judgment before the justice, but the same is afterwards reversed by the court of common pleas, the obligee is entitled to recover, as part of his damages, the costs incurred in the court of common pleas. *ib*

ATTORNEY.

- A subpoena to testify as a witness is a "process," within the meaning of
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the statute prohibiting any person, not the general law partner of an attorney, or a clerk in his office, from suing out any process, &c. in the name of such attorney. (2 R. S. 287, § 70.) *Yorks v. Peck*, 350

See CONSTITUTIONAL LAW, 1, 2, 3.
JUDGMENT, 4 to 8.
SHERIFF, 4 to 8.

B

BAIL.

See SHERIFF, 1, 2, 3.

BANKS.

1. Even though a bank has no authority to consign goods for sale, and enter into a general business of that nature, it may, perhaps, resort to that method of selling goods in its possession which it has legally received in payment of debts. *Per INGRAHAM, J. Perkins v. Church*, 84
2. On the 5th of January, 1855, C., a director in the Iliou Bank, pretended to sell to P., a person of little or no pecuniary responsibility, his stock therein of the par value of \$15,000, for the sum of \$17,250. P., with the connivance of C. and the cashier, who was the son of C., immediately pledged the same to the bank as security for the payment of his note at ninety days, executed to the bank at the same time, for the sum of \$17,250, and received from the bank the latter sum in the bills of the bank. This was charged to have been done in pursuance of a conspiracy between the three to injure and cripple the bank in its business, and to enable C. to impose his stock upon the bank at a price much greater than it was really worth; and in consequence of these proceedings the bank was greatly embarrassed in its business, and C. did receive for his stock a sum far beyond its actual value. *Held*, that whether the transaction was treated as a willful violation of the duty which C. and his son, the cashier, owed to the bank, growing out of their official relations to it, or as a direct conspiracy to

cripple and defraud the bank, the parties concerned in it were liable to the bank for the damages which it had sustained thereby. *Ilion Bank v. Carver*, 230

3. *Held also*, that in an action by the bank directly against them, for damages, no laches on the part of the plaintiff, short of the statute of limitations, would constitute a defense. *ib*

4. *Held further*, that this was an executed contract, and that although the plaintiff might have been guilty of laches, and so lost its right to repudiate the transaction, yet that upon a complaint sufficiently broad to cover a claim for damages, it might maintain an action upon that ground at any time allowed by the statute of limitations. *ib*

BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. Where two drafts were drawn in blank as to the amount, upon the defendants, and accepted by them, payable to the order of W., the maker, with the express understanding that the sums to be inserted should not in the aggregate exceed \$1000, and W. exceeded and disregarded this limitation of his authority, and filled in the blanks in the drafts with the sum of \$1250 each, and negotiated the drafts to the plaintiffs, before maturity, who paid him the money upon them without notice that W. had exceeded his authority; *Held* that under the circumstances, the plaintiffs were to be deemed bona fide holders for value, and that the commercial character of the paper would protect it, in their hands, from the defense that W. exceeded his authority. *Griggs v. Howe*, 100

2. *Held also*, that the acceptors having, themselves, put it into W.'s power to do the wrong, they could not be allowed to shift the loss from themselves, and cast it upon a bona fide holder for value. That of the two they were the least innocent. *ib*

3. A stipulation contained in a promissory note, by which the maker waives and relinquishes all right of exemption of any property that he

may have, from execution on the debt, will not have the effect to make property, otherwise exempt, liable to be taken upon execution. *Kneetle v. Newcomb*, 169

4. To entitle the holder of negotiable paper, which has been procured by fraud, to retain and enforce the same against the party defrauded, he must show that he paid value for it at the time, or incurred some responsibility, or relinquished some right, or discharged a precedent debt, upon the faith and credit of the paper. *Farrington v. Frankfort Bank*, 183

5. O., the drawer of two bills of exchange, obtained of the plaintiff his accommodation indorsement thereof, by means of a gross fraud, and negotiated the bills thus indorsed, to the defendants, to meet an indebtedness from the drawer and drawees to them, a part of which was upon bills of exchange then overdue and under protest. There was no express agreement that the new bills should be taken in absolute payment of the protested paper, or as collateral security for it. Nor were the protested drafts delivered up to the parties, at the time; but subsequently, the parties to the old drafts were credited with the avails of the new, and charged with the old, and the latter were marked or cut with the cancelling iron of the bank, and placed in a drawer with paper of the like character, where it remained. *Held* that the defendants were not entitled to protection as bona fide holders for value, against the equities of the plaintiff; but that the latter could maintain an action against them, to restrain them from transferring the bills, or enforcing their collection, and to compel them to cancel the plaintiff's indorsements. *ib*

6. *Held also*, that evidence of what passed between O. and the plaintiffs, and of the declarations made by O. at the time the indorsements of the plaintiffs were procured, was properly admitted. *ib*

7. Under such circumstances, if the transfer of the paper is not in payment and discharge of the prior in-

debtedness, as between the parties—and without affirmative evidence of the fact, it will not be presumed—it is not a transfer in payment, so as to cut off the equities of third persons. *ib*

8. A bill of exchange addressed to the drawees at the town or city in which they reside, may be accepted payable at some particular bank or place within the limits of such town or city. *Niagara District Bank v. Fairman &c. Machine Co.* 408

9. But an acceptance, making the bill payable at a *different place* from that in which the drawee resides, is a material departure from the tenor of the bill; and a presentment of the bill for payment at the place where it is by the acceptance made payable, will not be sufficient to charge the drawers. *ib*

BOARDS OF HEALTH.

1. The 8d subdivision of section 14 of the act concerning boards of health, confers upon those boards the power to make regulations for the suppression and removal of nuisances, and must be construed to have reference to that class of nuisances which can be the subject of regulation. *Rogers v. Barker,* 447
2. Neither a dam, thrown across a stream, nor a collection of water in a reservoir created thereby, is a nuisance *per se*. The question of nuisance or no nuisance depends upon the presence or absence of various extraneous facts and circumstances. And it is proper that the existence of those facts and circumstances, and the question of nuisance, should be referred to the common law trial by jury; instead of being determined by a board of health, and property being summarily destroyed by its order, without compensation to the owner, and without an opportunity being given him to be heard. *ib*
3. The legislature never designed to commit that unusual measure of power to the boards of health. *ib*
4. The rights of property, of every description, are qualified and restrict-

ed by the rule that they shall be so exercised as not to injure others. *Sic utere tuo ut alienum non laedas* is of universal application. But except in great and imminent emergencies the fact that they are injurious to others must be first established by the usual and customary proceedings of a trial in a competent court, before they can be taken away or destroyed. *ib*

5. Even if the power exists in boards of health to order property to be destroyed on the ground of its being a nuisance, and can be applied to the removal and destruction of a mill dam and a valuable water power used for manufacturing purposes, it is a power which must be exercised in subordination to the judicial authority of the state, and subject to be suspended and held in abeyance by the order of a court having jurisdiction of the subject, whenever the principal facts upon which its exercise depends are put in controversy and rendered doubtful, until they are established by due process of law. *ib*
6. If a board of health has authority and jurisdiction to determine the question of nuisance, and to order the suppression and removal of a dam as such, they should be required to state, in their adjudication, what the nuisance is—whether the dam itself, or the waters collected above the dam, and if the latter, how much of the structure shall be removed in order to dissipate and disperse the waters; and especially should the order or adjudication designate the particular dam or obstruction which they design shall be taken away. *ib*
7. Where a board of health, by resolution, declared and adjudged that the damming of the water in a particular river was "a dangerous nuisance, and detrimental to the health of the inhabitants," and then adjudged that all such nuisances be removed within three days; it was *held* that this was too vague, indefinite and uncertain to authorize the removal of a mill dam thrown across the river, by means of which the waters had been applied as a power for driving machinery, for more than sixty years. *ib*

BOND.

See ATTACHMENT, 4, 5.

BROOKLYN, CITY OF.

1. The authority given by its charter to the corporation of the city of Brooklyn, to open and grade streets and avenues, is a most vital and valuable part of the sovereign power of the state, and the common council is accountable for the manner of its exercise. *Beard v. City of Brooklyn*, 142
2. It cannot institute proceedings to open and grade streets, &c., and through mere negligence and inattention leave them imperfect and incomplete, to the detriment and injury of individuals. *ib*
3. In making contracts with others, in execution of the powers bestowed upon the corporation, no liability will be created, so long as the corporation acts within the scope of its authority, and with usual and reasonable diligence. But it cannot, with impunity, enter into contracts with individuals, by which they are induced to expend their labor and substance in works of public improvement, and then refuse, or negligently omit, to employ the means given it by law, for their recompense and reimbursement. *ib*
4. Thus, if, after having entered into a contract with an individual for grading, regulating and forming an arch in an avenue of the city, and the contract has been fully performed by the contractor, the common council neglects to lay, confirm and collect the assessment for the cost of the work, an action, substantially on the case for negligence, will lie against the corporation, in favor of the contractor. *ib*
5. In an action by the holder of a certificate issued by the city of Brooklyn, which stated that there would be due to B. or P. or order, from the city, on the contract for grading and paving W. avenue, \$2000, payable on surrender of the certificate when the assessment for said improvement should have been collected and paid into the city treasury; *Held* that it

was erroneous for the judge to instruct the jury that they might regard the certificate as a contract on the part of the city to advance a portion of the money in advance of the completion of the work; and that if they thought, from the evidence, the corporation had not caused due diligence to be used in collecting the assessment, whereby the assessment had not been collected, sufficient to pay the plaintiff's claim, the plaintiff was entitled to a verdict. *Richardson v. The City of Brooklyn*, 152

6. In an action to recover penalties incurred under the ordinance of the city of Brooklyn of July 3d, 1850, "to prevent the sale of certain commodities" in that city "on Sundays," for exposing to sale and selling liquor, on that day, it is erroneous, after proof of selling, only, for the judge to charge the jury that the plaintiffs are entitled to recover one penalty for exposing to sale, and one penalty for selling liquors, &c. on the same Sunday. *City of Brooklyn v. Toynbee*, 282
7. Under that ordinance a party is not liable to two penalties for the same act, one for exposing to sale, and the other for selling. *ib*
8. Every sale necessarily includes an offer of the goods sold; and one single act of selling cannot be divided into two offenses. *ib*

See ACTION, 7, 8.

BROOKLYN INDUSTRIAL SCHOOL, &c.

Where a child has been duly surrendered by its father and natural guardian to the Brooklyn Industrial School Association and Home for Destitute Children, pursuant to the charter of that association, by an instrument in writing signed by the father, such surrender will not be superseded, and rendered inoperative and void, by an order subsequently made by the surrogate, appointing an individual the general guardian of the infant. *The People, ex rel. The Brooklyn Industrial School, &c. v. Kearney*, 480

C

CARELESSNESS.

See ACTION, 5, 6.

CARRIER.

1. A common carrier of passengers may, by agreement, provide that a passage shall be made within a time specified, and in one continuous trip. *Barker v. Coffin*, 556
2. Thus, where the plaintiff paid for a passage from New York to Buffalo by the Hudson River and New York Central Rail Roads, and received a passage ticket, which specified that it was to be used within three days, and was good for a continuous trip only; it was held that the ticket was to be regarded as the evidence of a contract which the rail road companies were authorized to make; and that it conferred upon the plaintiff a right of passage, to be exercised within three days, and during a continuous trip, only. *ib*
3. And the plaintiff having proceeded as far as Albany, upon the rail road, and then left the cars and remained there six or seven days, it was further held that upon resuming his journey, after the expiration of the time specified in the ticket, he was liable to pay an additional fare to the rail road company; and that upon his refusal to pay, the conductor was justified in removing him from the cars. *ib*
4. In an action against a carrier, for a breach of his duty as such, although negligence be averred, in the complaint, it is not necessary to show any positive misconduct, to sustain the averment. *Merritt v. Earle*, 38
5. Any act or omission of the carrier, or any thing which may befall his vessel and occasion danger to property, is regarded by the law as negligence, unless it be the act of God or the public enemies. *ib*
6. To sustain an action against a carrier for an omission to deliver property, it is sufficient that the property was received by the defendant's servants, on his vessel, for transportation,

and that while he was engaged in transporting the same the property was lost, and not safely delivered. *ib*

7. Upon these facts the carrier is liable, without any contract, and independent of any, unless the loss of the vessel was occasioned by the act of God. *ib*
8. Where the act of God is relied upon to excuse the carrier, it must be not only the sole, but the immediate, and not a remote cause of the loss. *ib*
9. A loss occasioned by an obstruction in a river, produced by mixed causes, and which is not the result of the operation of natural forces upon natural objects alone, as the shores or the bottom, is not, in a logical or a legal sense, the act of God. *ib*
10. Thus where a steamboat, carrying property for hire, was wrecked in the Hudson, by running upon the mast of a sunken vessel which had been capsize and sunk by a violent storm, a day or two before; it was held that the owner of the steamboat was liable for property lost by the sinking of the steamer. *ib*

CHATTEL MORTGAGE.

1. Where a chattel mortgage is given to secure the surety and indorser of a note made by the mortgagor, and such note, after being protested for non-payment, is paid out of the proceeds of a new note made by the mortgagor and indorsed by the mortgagees for that express purpose, the mortgage is not discharged by the payment of the original note, but continues in force, as a security to the mortgagees, for the amount of the second. *Chapman v. Jenkins*, 164
2. In such a case it is proper to show that the payment of the original note with the proceeds of the second was not designed to extinguish the mortgage. *ib*
3. Notice to a judgment creditor, of an existing mortgage, is no answer to his objection that the mortgage

has not been filed. *Stevens v. Buffalo and New York City Rail Road Co.*, 590

See RAIL ROAD COMPANIES, 8 to 11.

CHOSE IN ACTION.

A chose in action owned by an individual at the time of his death, belongs to his personal representatives, after his decease; and his widow has no authority to assign the same, in the absence of any proof that she is executrix or administratrix of her husband. *Heidenheimer v. Wilson*, 636

CITIZENSHIP.

1. The statutes of the English parliament, relative to the children of British subjects, born abroad, were in force in the province of New York down to the time of the American revolution, and were continued by the constitution of the state of New York, adopted in 1777. But in 1778 it was enacted that after the first day of May then next, none of the statutes of Great Britain should be considered laws of this state. The effect of this, and of the subsequent legislation of congress upon the subject of naturalization, has been to leave the condition of all the children of American citizens born abroad between the years 1802 and 1855 exclusively to the decision of the dormant principles of the common law. *Ludlam v. Ludlam*, 486

2. By the common law, when a subject is traveling or sojourning abroad, either on the public business, or on lawful occasion of his own, with the express or implied license and sanction of the sovereign and with the intention of returning, as he continues under the protection of the sovereign power, so he retains the privileges and continues under the obligations, of his allegiance, and his children, though born in a foreign country, are not born under foreign allegiance, and are an exception to the rule which makes the place of birth the test of citizenship. *ib*

3. The universal maxim of the common law being *partus sequitur patrem*,

it is sufficient for the application of this doctrine that the father should be a subject, lawfully and without breach of his allegiance beyond sea, no matter what may be the condition of the mother. *ib*

4. The children of subjects thus sojourning or traveling beyond the seas were recognized as denizens, under English law, when and as fast as the occasion and instances of foreign travel and temporary residence multiplied, and the question was presented to the courts; and this was by the development and application of the doctrines of the common law, and not by mere force of statutes. *ib*

5. The statute of Edward 3, *De natis ultra mare*, was not intended to abrogate, nor is it to be understood as abrogating, an existing rule of law and introducing a new rule by the will of the legislature, but was declaratory in its nature; or at least, furnishes no evidence that the rule of the common law was other than that contained in its provisions, but rather the contrary. *ib*

6. In accordance with the above principles, *Held* that the defendant, the son of an American citizen by an alien mother, born in a foreign country while his father was temporarily resident there, was a citizen of the United States, and entitled to inherit here. *Lorr, J. dissented.* *ib*

7. *Held also*, that the greater or less duration of the father's residence abroad was not material; so long as it was, in intention and in fact, temporary, and not perpetual. *ib*

CITY COURT OF BROOKLYN.

The city court of Brooklyn being a court of special and limited jurisdiction, a referee appointed by it has no power to try a cause in the city of New York. *Bonner v. McPhail*, 106

COMMON SCHOOLS.

1. Two trustees of a common school district may issue a warrant for the

collection of a tax; and the presence of the third trustee at the issuing thereof will be presumed, until the contrary is shown. *Doolittle v. Doolittle*, 812

2. The tax list itself need not be signed by the trustees. The signing of the warrant to which the tax list is annexed is sufficient. 3b

3. A tax warrant, valid on its face, issued by the trustees of a school district in pursuance of a previous order of the board of supervisors, will justify the collector in taking property thereon, even though such order was void. 3b

4. And being a protection to the officer, it will also protect those who aid him in taking the property. 3b

CONDITIONAL SALE.

See VENDOR AND PURCHASER, 7.

CONSIDERATION.

See CORPORATION, 5.

CONSIGNOR AND CONSIGNEE.

1. Where a contract for the sale and purchase of property has been executed, by the delivery of the property to the purchaser, the latter becomes vested with the title to it; at least so far as persons receiving the same from him to sell on commission, are concerned. And whether the property was originally obtained by the vendor under an illegal contract, or not, does not affect the question of the liability of the consignees to account to the consignor for the moneys received by them upon the sale of the property. *Alford v. Latham*, 294

2. The undertaking of the consignees to sell the property for the consignor on commission is upon a new and distinct consideration, having no actual or necessary connection with the original contract. And the consignees are in nowise privy to that contract, or in a position to question the title of the consignors, to the property. 3b

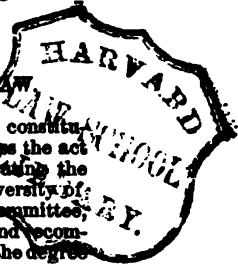
3. It is competent for the owners of property to impose upon their agents for the sale thereof, such restrictions as they may deem necessary to restrain them from interfering with their agencies in other parts of the country. 3b

4. Even if such restrictions were to be deemed in restraint of trade, and therefore not binding upon the agents, that would not give to the latter the right to retain money in their hands which they have collected as the agents of the owners of the property, and which belongs to such owners.

CONSTITUTIONAL LAW

1. The legislature had no constitutional right or power to pass the act of April 6, 1860, constituting the faculty of law of the university of the city of New York a committee, upon whose examination and recommendation, as evinced by the degree of bachelor of laws, conferred, upon their recommendation, by the council of the university, any graduate of the law department, shall be admitted to practice as attorney and counsellor at law in all the courts of this state; and thus to take away from the supreme court the right and power which it had previously exercised, of ascertaining and determining for itself, and under its own rules and regulations, whether the applicants are of the class or description of persons, by the constitution entitled to admission, and have the requisite constitutional qualifications, of learning, ability and moral character. That act is in conflict with section eight of article six of the constitution. *Matter of the Law Graduates of the University of New York*, 285

2. The legislature had no right to declare that diplomas conferred under the act shall be sufficient evidence of the requisite learning and ability of the applicants, and shall entitle them to admission; either with or without the evidence of moral character, citizenship and age, required by the second rule of the court; or with or without evidence of their attendance in the university, and of



- their study of the law elsewhere, for the period or terms mentioned in the act. 25
2. Accordingly held that graduates of the law department of the university of the city of New York cannot be admitted to practice as attorneys and counselors, without submitting to the usual examination. 25
4. The act of the legislature, of April 19, 1859, "to enable the supervisors of the city and county of New York to raise money by tax," was not unconstitutional as containing matters not embraced in its title. *Sharp v. Mayor &c. of New York*, 572
5. Whether the act of the legislature, of April 10, 1855, creating the office of justice of the peace of the village of Medina, and clothing the incumbent with the same jurisdiction, in civil and criminal cases, as justices of the peace of the several towns of the state is unconstitutional and void? *Quare. Heidenheimer v. Wilson*, 636
6. Although, as an original question, it might be difficult to sustain the authority of the legislature in such cases, yet it seems the principle is settled, in favor of the right, by the court of appeals, in *Sill v. The Village of Corning*, (15 *N. York Rep.* 297.) 25
3. In an action by a creditor of a bank against a stockholder, for the recovery of a debt due from the bank, the corporation is not a necessary party. 25
4. The power which prescribes the formalities to be observed in order to create a corporation, is able to dispense with them. *Black River and Utica Rail Road Company v. Barnard*, 258
5. A subscription for shares of the capital stock of a manufacturing company is a legal obligation, which can be enforced by action, and by forfeiture for non-payment. It is therefore a good consideration for giving a bond and mortgage to secure the payment of the amount subscribed. *Battershall v. Davis*, 328
6. And the neglect or omission of the company to issue to the mortgagor scrip for the shares, at his request, will not amount to a failure of the consideration; where it appears that should the officers of the company issue the stock without payment therefor in money, they would make themselves liable for the amount, to the creditors of the company. 25
7. A stockholder of a corporation, after having joined in an application made to the court by the receiver, for authority to sell the assets of the corporation, cannot be permitted to question the validity of the receiver's appointment, or of the order directing the sale. 25

CORPORATION.

1. To sustain an action against a stockholder of an incorporated company, for a debt of the company, it is not necessary for the plaintiff to aver that the corporation is insolvent; except in those cases where the charter makes the liability of the stockholders depend upon the existence of such insolvency, or requires the creditor to exhaust his remedy against the corporation, before proceeding against a stockholder. *Perkins v. Church*, 84
2. In other cases, where a debt is unpaid at maturity, the creditor may proceed to collect his claim, either from the corporation or those who, by the charter, are made responsible for the debts. 25
3. The creditors of a dissolved insolvent corporation have an equitable lien upon its assets, in the hands of another, for the payment of their debts. *Tinkham v. Borst*, 407
9. And it matters not whether the person holding the assets sought to be charged came by them fairly, or by force or fraud; unless he has acquired a higher or better equity to such assets than the creditor. 25
10. Upon the dissolution of a corporation the title to real property held by it does not revert to the original proprietors and grantors, or their heirs, but vests in the receiver of the corporation; and the property, real and personal, of the corporation, is

to be administered by him for the benefit of creditors and stockholders. *Owen v. Smith*, 641

11. The rule of the common law, in relation to the effect of a dissolution, upon the property and effects of a corporation, is a harsh and inequitable rule, and *if seems*, has never been, to the fullest extent, adopted and acted upon as the rule in this country; at least so far as the extinguishment of debts is concerned. And the rule was changed, in this state, by the act of April 9, 1811, for the relief of the creditors of corporations. (1 R. L. 248. 1 R. S. 600, §§ 9, 10.) *ib*

See RAIL ROAD COMPANIES.

COUNTER-CLAIM.

See PLEADING, 4, 5.

D

DAMAGES.

See ACTION, 5, 6.
ATTACHMENT, 4.
VENDOR AND PURCHASER, 5.

DEATH BY WRONGFUL ACT, &c.

An action can be maintained, under the act of 1847, "requiring compensation for causing death by wrongful act, neglect or default," by an individual as administrator of his deceased wife, whose death was caused by the negligence of the defendant, on a complaint alleging that the deceased left a mother, who was her next of kin, surviving her. *Green v. Hudson River Rail Road Company*, 260

DECREE.

See DIVORCE.

DEED.

1. Where a deed is not acknowledged previous to delivery, it must be attested by at least one witness; or it will not take effect, as against an

incumbrancer or purchaser, until it is acknowledged. *Gentier v. Morrison*, 155

2. The presumption that an instrument was executed and delivered at the time it bears date does not hold in respect to deeds in fee, unattested and unacknowledged. *ib*
3. Whether such a deed was actually executed and delivered at the time it bears date, or not, is a question of fact for the jury; and if the evidence upon it is conflicting, the case should be submitted to them. *ib*
4. It is not essential to the validity of a deed, in law, that the consideration specified in it, or any portion of it, should be in fact paid. It is sufficient if it is stated in the deed to have been paid. *Winans v. Peebles*, 871

See PARENT AND CHILD.

DEMURRER.

A demurrer cannot perform the office of a plea in abatement for want of parties, by furnishing the names of persons deemed necessary parties to the action, who have not been joined. *Coe v. Beckwith*, 839

DESCENT.

V. died intestate, in 1840, seised of certain real estate in fee, leaving him surviving a widow, and three children, to wit: H., C. and A. The widow married H. C. W., and by him had one child, H. W., who was still living and under age. The widow died in 1853. A. died in 1845, intestate and under age. H. was married to T. W. and by him had one child, and died in 1853, under the age of 21 years. The child afterwards died. C. died in 1856, unmarried and under the age of 21 years. In 1852 the premises were sold by order of the county court, upon the petition of the infants, H. and C., and the proceeds of the sale were brought into court. The plaintiffs claimed this fund as the brothers and sisters of V., the original owner, to the exclusion of H. W. the daughter of V.'s widow by the

second marriage, and the claim of T. W. as tenant by the curtesy, in the share of H. *Held*, 1. That at the time of the death of C. the whole fund had vested in her, not as personality, but as realty; the fund continuing to be real estate, of the same nature as the property sold. 2. That one third of this she owned by descent directly from her father, and to the other two thirds she acquired title by descent from her brother and sister, H. and A., who took the same as heirs at law of their father. 8. That as to the one third derived by C. directly from her father, and as his heir at law, the plaintiffs were entitled to it, under the statute, inasmuch as the estate came to her by descent from her ancestor; and that H. W. not being of the blood of that ancestor, was excluded. 4. That the other two thirds came remotely or indirectly and by intermediate descent, from the same source, but it formed no part of the ancestral inheritance. That as to that portion the descent from H. and A. to C. was direct and immediate, and the latter took as their representative, and not as the heir of V. their common ancestor. 5. That H. W., the half sister, inherited immediately from the intestate, and was entitled to those two thirds of the estate. 6. That H. W. and T. W. were necessary parties to a suit brought for the purpose of having the rights of the several claimants of the fund determined. *Valentine v. Wetherill*, 655

DIVORCE.

1. Where a man, being a resident of this state, and having a wife who also resides here, goes to another state and in a suit brought there obtains a decree of divorce against his wife, without any service of process upon, or notice to, her, or any appearance by her, such decree is void, and unavailing for any purpose whatever. *McGiffert v. McGiffert*, 69
2. The words "such circumstances," in the 4th subdivision of § 42, 2 R. S. 145, which declares that although the fact of adultery be established, the court may deny a divorce, "when it shall be proved that the

complainant has also been guilty of adultery under *such circumstances* as would have entitled the defendant, if innocent, to a divorce," do not refer to the circumstances, (of inhabitancy, &c.) mentioned in section 48 as defining when the court may decree divorces for adultery, but to the circumstances of procurement or connivance alone, mentioned in subdivision 1 of § 42. *Lessner v. Lessner*, 830

3. The section virtually declares that although the court may have jurisdiction and power to grant the divorce, and the adultery on the part of the defendant shall be proved, yet the court shall not grant the divorce if the complainant has been guilty of adultery committed without the procurement or connivance of the defendant. *ib*
4. An answer setting up the adultery of the plaintiff, as a defense, need not allege either that the parties were inhabitants of this state, at the time of the commission of the offense; or that the defendant, at that time, and at the commencement of the action, was an actual inhabitant of this state. *ib*

DOMICIL.

1. What is to be considered the *domicil* of a person, at the time of his death, for the purpose of determining the rights of his widow in his personal estate. *Hegeman v. Fox*, 475
2. There must be both the fact of abode and the intention of remaining indefinitely, to constitute a domicile. *ib*
3. Both must therefore be proved. The first is readily proved as a single fact; the other may be established by declarations of the party, or by his conduct. *ib*
4. Circumstances which were held sufficient, in this case, to show that the deceased had, at the time of his death, not only an actual residence in the state of Florida, but that he had acquired the same with the intention of remaining there an unlimited or indefinite time. *ib*

E

EASEMENT.

See AGREEMENT, 8.

EJECTMENT.

1. A person who has been evicted from the possession of lands, can, without showing any title in himself, maintain an action for them, against the grantee of his disseisor, who is also without title. *Clute v. Voris*, 511
2. One who is a purchaser at a sale under the foreclosure of a mortgage made by a party disseised, while in possession, can assert the same rights as the disseisee, and recover upon his possession, without proving that he has ever been in possession, himself. *ib*

ELECTION.

See WILL, 6.

EPISCOPAL CHURCH.

See RELIGIOUS SOCIETIES.

EQUITY.

See AGREEMENT, 1.

EVIDENCE.

Contemporaneous parol stipulations, contradicting or varying the legal effect of written contracts, cannot be received in evidence. *Johnson v. McIntosh*, 267

EXECUTION.

See BILLS OF EXCHANGE, &c. 8.

EXECUTORS AND ADMINISTRATORS.

See SURREGATE, 1.
WILL, 7.

EXEMPTION OF PROPERTY.

See BILLS OF EXCHANGE, &c. 8.

F

FORWARDER.

See PRINCIPAL AND AGENT.

FRAUD.

1. Where a party, through the fraud and deceit of another, has sold and conveyed land to the latter, in exchange for worthless stock, he may maintain an action to recover damages for the fraudulent representations whereby he was induced to enter into the contract, without rescinding the contract or restoring the property which he has received under it. *Newbery v. Garland*, 121
2. Where the complaint, in such an action, stated a number of representations made by the defendant, as to the property and condition of the company with which he was connected, and as to the value of its stock, and charged that these representations were false, to the knowledge of the defendant, and that they were made with intent to defraud the plaintiff, to induce her to believe that the stock was of great value, and to part with her real estate in exchange for certain shares held by the defendant; and that such representations were uttered in published reports and statements of the condition and property of the company, made and signed by him as one of its officers, and generally and publicly circulated and advertised; *Held* that the action would lie, although the false representations were published to the world, and not made in the course of the dealings with the plaintiff; the defendant being privy to the contract made by the plaintiff, and interested in the sale which was induced by his false representations. *ib*
3. Although it is not alleged in the complaint, in terms, that the defendant's representations were read by, or came to the knowledge of, the plaintiff, yet if it is alleged that she was induced by these representations to purchase a certain number of shares of the stock, and to give in exchange for them a conveyance of her lands, this is sufficient; inasmuch as it involves the knowledge

of the defendant's statements by the plaintiff, and connects her contract, and subsequent loss, with those statements, as effect and cause. *ib*

See **BILLS OF EXCHANGE, &c. 4, 5.**

VENDOR AND PURCHASER, 6, 7.

G

GRADUATES OF UNIVERSITY OF NEW YORK.

See **CONSTITUTIONAL LAW, 1, 2, 3.**

GRANTS.

1. The king's grants are matters of public record, and no freehold can be granted by him but by matter of record. And the grants must pass through the prescribed offices, and be transcribed and enrolled. *McKinnon v. Bliss*, 180

2. The record of a grant, like every other record of a foreign court or government, is susceptible of proof. *ib*

See **PATENTS.**

GUARANTY.

1. In case of a guaranty, the obligation to prosecute the principal debtor within a reasonable time, and with due diligence, is a condition precedent to the liability of the guarantor. *Gallagher v. White*, 92

2. There is a material distinction between an omission to prosecute the principal debtor, altogether, and an omission to prosecute within a reasonable time, and with due diligence. *ib*

3. A reasonable time is not a definite time, and must always depend upon the particular circumstances of the case presented. *ib*

4. If a guarantor intends to rely upon a want of diligence in collecting, or in efforts to collect, the money due from the principal debtor, as a real and substantial defense, he should raise and present the question distinctly, for the judgment of the court, by asking for specific instructions to be given to the jury. *ib*

5. Where a subsequent holder of a promissory note sues upon a guaranty indorsed thereon, claiming that the guaranty passed to him on the transfer of the note, it is competent for the guarantor to show that it was not the intention of the parties that the guaranty should accompany the note, on the transfer of the latter to the plaintiff, but that on the contrary, it was expressly agreed that he should take the note at his own risk. *ib*

6. S. made a note, payable to W. or bearer. W. transferred the note to B., in part payment for a piano, at the same time guarantying its collection, by an indorsement upon the back thereof. S. failing to pay the note, at maturity, W. took it up from B. He subsequently transferred the note to the plaintiff, who expressly agreed to take the same at his own risk. Through inadvertence, however, the guaranty was not erased, at the time of the transfer. *Held* that the guaranty being a contract between W. and B., when W. paid B. the amount of the note and took it up, the guaranty was *functus officio*; and having performed its office, its force and vitality was gone; and that consequently the plaintiff could not maintain an action thereon. *ib*

7. B. made a note for \$500, payable to G. or bearer. The note was made without consideration, for the accommodation of G. and to enable him to raise money, and was delivered by G. to the defendant, to be used to raise money for G. The note was afterwards signed, by G. also, without the knowledge or consent of B. The defendant then indorsed upon the back of the note a guaranty of the payment thereof, and sold the note to Burton, the plaintiff's assignor, for \$425. *Held* that if the note was a valid note in the hands of G., as against B. when originally delivered to G., the transaction was not usurious, and the defendant was liable upon the guaranty, although G. signed the note without the knowledge or consent of B. at the same time the guaranty was signed, and the money advanced to G. by Burton. *Burton v. Baker*, 241

8. The plaintiff was accordingly adjudged to be entitled to recover of

the defendant, upon his guaranty, the amount actually advanced by Barton, upon the purchase of the note, with interest. *ib*

9. If a surety is to be held upon his contract, that contract must remain unchanged, unless by his consent; and he must be held according to the tenor of the contract, or not at all. *Henderson v. Marvin*, 297

10. Where M. agreed to guaranty to the plaintiffs the payment of the price of goods to be sold to a third person, prior to January 1, 1857, to the amount of \$500, on a credit of six months, and after the sales of the goods and their delivery, the plaintiffs extended the term of credit, as to a part of the amount, and shortened the term as to a part of the amount, by taking the third party's promissory notes therefor, having different periods of time to run; held that the guarantor was discharged. *ib*

GUARDIAN AND WARD.

1. A guardian of an idiot, appointed in another state, is but the guardian of the person and estate of the idiot within that state. His appointment has no extra territorial force, and gives him no power over the estate of the idiot within this state. *Rogers v. McLean*. 804

2. In this country the rights and powers of guardians are considered as strictly local, and not as entitling them to exercise any authority over the person or personal property of their wards in other states; upon the same general reasoning and policy which has circumscribed the rights and authority of executors and administrators. *Per ALLEN, J.* *ib*

3. Neither are the rights of foreign guardians over immovable property situated in this state, admitted here. *ib*

See BROOKLYN INDUST. SCHOOL, &c. JURISDICTION, 3.
LANDLORD AND TENANT, 2, 3.

H

HUSBAND AND WIFE.

1. Where a married woman sues alone, and her disability does not appear

upon the face of the complaint, the defendant, if he intends to avail himself of the coverture as a defense, should set it up in his answer. *Dillaye v. Parks*, 182

2. If the defendant, in his answer, merely denies each and every allegation in the complaint, he waives whatever advantage he might have had by pleading the coverture. *ib*

3. Where a promissory note is indorsed over and delivered to a married woman, by the payee, the property in the note vests in her; and, not proceeding from her husband, it is acquired in the form and mode prescribed by the statute for the acquisition of property by married women, which they are to hold and enjoy as their separate estate. *ib*

4. The possession of, and property in, the note, constitute a separate estate therein, which will authorize a married woman to sue, alone, upon such a note. *ib*

5. Where a lease for a term of years is executed to husband and wife, jointly, the rights and interests of the lessees, respectively, by and under the lease, and in and over the demised premises, are what they are declared to be by the common law, and are unaffected by the acts of 1848 and 1849, for the more effectual protection of the property of married women. *Goslet v. Gori*, 814

6. Those acts were not intended to enable married women to take and hold property jointly with their husbands, but to take and hold and dispose of property as if they had no husbands. *ib*

7. In case of a joint lease to husband and wife, the wife will not be deemed to have intended to charge her separate estate, by the covenant for payment of rent. *ib*

8. At law, and if seems, in equity, the covenant to pay the rent, at least during the life of the husband, is to be deemed the sole covenant of the husband; and the rent due and unpaid will be considered the debt of the husband, only. *ib*

9. Since the acts of 1848 and 1849 "for the more effectual protection of married women," a married woman can execute a valid conveyance of her real estate, to her husband, which will bind her heirs. *Winans v. Peebles*, 871

10. If such a conveyance is not valid at law, it is good, and may be sustained, in equity. *ib*

11. A married woman can, by signing a note with her husband, as his surety, intending thereby to charge her separate estate, and agreeing by parol that such estate shall be charged, bind her separate estate, in equity, to the payment of the note. *Yale v. Dederer*, 525

12. Where money belonging to a husband was delivered by his wife to the defendant, to be by the latter applied to a special purpose, viz. the payment of the interest due upon the husband's bond and mortgage held by the state, and receipts were given by the defendant, acknowledging that he had received the money of the wife for the purpose named; *Held* that the wife was to be deemed as acting as the agent of her husband, who was the proper person to sue for the money, and that an action would not lie in the name of the wife. *Brouer v. Vandenberg*, 648

See PARTIES, 2.
WITNESS, 2.

I

INJUNCTION.

See ACTION, 1.

PAYMENT.

RELIGIOUS SOCIETIES, 12.

INSURANCE.

See MUTUAL INSURANCE COMPANIES.

J

JUDGMENT.

1. A statement of indebtedness, made on a confession of judgment, in these

words: "Promissory note for a specified date and amount, which note was given to L. W. & Co. for goods, wares and merchandise theretofore purchased of L. W. & Co. by the defendant, which note was indorsed by the debtor and came into the hands of the plaintiffs for a valuable consideration," *held* defective, in not stating the facts out of which the indebtedness arose. *Claffin v. Sanger*, 88

2. A prior judgment, confessed by two partners in a firm consisting of three members, for the purpose of securing a partnership debt, is a lien upon the interest of the two in the partnership property; and is entitled to priority in payment, out of the surplus moneys arising from a sale of the property under a mortgage, over subsequent judgments recovered against all the members of the firm. *Stevens v. Bank of Central New York*, 290

3. In such a case the rights of the parties must be determined by the priority of their legal liens; and the holder of the prior judgment will be entitled to two thirds of the fund, and the subsequent judgment creditors to one third. *ib*

4. Where the act of an attorney, in appearing in an action without authority and suffering or confessing a judgment against a person who has not employed him, results in charging an innocent party with a debt which he does not owe, and in creating a lien which may deprive him of his property against his will, and without his fault, it is a wrongful act, and one which the courts are bound to redress. *Ellsworth v. Campbell*, 184

5. In such a case the party will not be compelled to seek his remedy against the attorney. *ib*

6. The court will stay all proceedings upon the judgment, but it will preserve the lien which the plaintiff has acquired by his judgment, and give the defendant an opportunity to plead, if he has any plea to make, to the merits. *ib*

7. The supreme court has power to relieve a party to an action pending in

it from a judgment or order obtained against him by reason of the negligence, ignorance or fraud of his attorney. *Sharp v. Mayor &c. of New York*, 578

8. The modern practice is for the court to relieve the client, without reference to the responsibility of the attorney, when a proper case for granting relief is established. *ib*

Ses New York, CITY OF.

JURISDICTION.

1. Where partition is sought by action, the court must in some regular way have acquired jurisdiction of the party to be affected by the judgment, as well as of the subject matter of the action; and if that jurisdiction of the person has not been acquired, the judgment is, to this extent, a nullity, and the title to be acquired under it defective. *Rogers v. McLean*, 804
2. In order to a voluntary appearance which will give the court jurisdiction of the person, there must be action by the party himself, or by some one authorized by law to speak and act for him. *ib*
3. Where, in a partition suit, one of the defendants was an idiot infant, and there was no attempt made to serve a summons on him, or upon any person representing him, and no notice was taken, in the complaint, of his disability, and a guardian *ad litem* for him was appointed upon the petition of a resident of Ohio, claiming to act under an appointment of "the court of probate," of Warren county, Ohio, as guardian for the idiot infant; the idiot not being personally within the jurisdiction of the court, and not being proceeded against by publication of a summons, which would have given the court a statutory jurisdiction; *Held* that the Ohio guardian could not by his act and petition give the court jurisdiction of the idiot's real property situated within this state; that such guardian had no rights or authority within this state, in respect to the idiot's person or property; and that consequently a judgment in the suit, against the idiot, was a nullity, and

his estate was not divested by a sale under such judgment. *ib*

4. The supreme court has the right and power, in a proper case, to decree a mortgage upon real estate void for usury, and to compel the party holding it, to surrender it up to be canceled, although the lands mortgaged lie in another state. *Williams v. Ayrault*, 864
5. If the cause is one of equitable cognizance, and the parties are within the jurisdiction of the court, the court will exercise its authority, although the property in question lies beyond its jurisdiction. *ib*
6. Hence the court will decree the cancellation of a void mortgage, which is an apparent lien and cloud upon property situated beyond the jurisdiction of the court. *ib*
7. As a general rule, a party cannot come into a court of equity to have a usurious obligation surrendered up and canceled, if he has a perfect remedy at law. And if there are any circumstances in the case by reason of which it is difficult or impossible for him to obtain complete and perfect relief, against the usurious contract, or instrument, at law, he must state them in his complaint. *ib*
8. But in the case of a mortgage upon real estate, the necessity of coming into a court of equity to have the instrument surrendered and canceled, is sufficiently apparent, without showing any reason, other than the fact that the mortgage has been executed and delivered and placed upon record, if it is void from any cause not apparent upon its face. *ib*
9. When a fund exists in this state, which our own citizens are entitled to have applied to the payment of their debts, the courts will detain and appropriate the fund, although the persons holding it may be accountable to a foreign jurisdiction, in reference to it. *Tinkham v. Borst*, 407
10. The court will not, in such a case, disregard the rights of other parties, but it will ascertain them, and apply that portion which, after such investigation, is found to belong to our own citizens. *ib*

11. Where a judicial tribunal has general jurisdiction of the subject matter of the controversy or investigation, and the special facts which give it the right to act in a particular case are averred and not controverted upon notice to all proper parties, jurisdiction is acquired, and cannot be assailed in any collateral proceeding. *Bumstead v. Read*, 661

12. Where the judicial tribunal has not general jurisdiction of the subject matter, under any circumstances, no averment can supply the defect; no amount of proof can alter the case; no consent can confer jurisdiction. *ib*

13. Where the judicial tribunal has not general jurisdiction of the subject matter, but may exercise it under a particular state of facts, those facts must be specially averred and established; and when so established on a hearing of all proper parties, cannot be impeached in any collateral proceeding. *ib*

14. Where, upon an application to a surrogate for probate of a will and for letters testamentary thereon, the residence of the testator, at the time of his death, in the county of such surrogate, is plainly averred in the petition, and is not in any way controverted but is substantially admitted by all the parties interested in the will, and is practically established upon sufficient evidence, as a fact, by that tribunal, that court has jurisdiction of the case; its determination is conclusive, as to the validity and probate of the will, and cannot be examined or assailed in any collateral proceeding or in any other tribunal of original jurisdiction. *ib*

See EQUITY.

PRACTICE, 2, 3.

JUSTICES OF THE PEACE.

1. Where a cause before a justice of the peace is submitted by the counsel, at the close of the evidence, with an agreement that within the four days in which the court is to render judgment they will appear before the justice and argue the cause, the case is in effect postponed for a final hearing to the fourth day; and the

justice has a right with, or without the consent of the parties, to take four days from that time, for the decision of the cause. *Heidenheimer v. Wilson*, 636

2. And whether the justice, on the day of the summing up, will or will not receive further evidence, is a matter wholly within his discretion, and the exercise of such discretion will not be reviewed by the supreme court, on appeal. *ib*

See ATTACHMENT, 4, 5.

CONSTITUTIONAL LAW, 5, 6.

L

LACHES.

See BANKS, 2, 3, 4.

LANDLORD AND TENANT.

1. By the terms of a lease, the tenure of the demised premises was to commence on the 1st day of May, 1852. The tenant was to have the use of a certain rail road, in common with others, and was "to put the same in order above the chemical works, if he wished to use it," and the lessor reserved the use of it to himself also. The road was entirely out of repair. The tenant used a part of it, below the chemical works, for the purposes of his business, for a short time, but he never repaired it, or in any way used the road above those works. Nothing was transported over any portion of it, after July, 1852. The lessee removed a portion of the railway, so as to prevent its use, before any part thereof was taken up by the lessor. The lessor removed a part of the rails, in April, 1853, and the lessee, in May thereafter, with knowledge of such removal, paid to the lessor the rent which accrued during that month. When the rent for the months of June, July and August was demanded of the lessee, he promised to pay it in a few days, and subsequently gave his note for the amount, without making any complaint about the removal of the rails by the lessor. *Held* that it was fairly inferable from these facts that the lessee did not wish to use the rail road above the chemical works, and had determined to abandon, and had abandoned, the use of the whole

of it, previous to the tearing up and removal of the rails by the lessor, and had by his own acts rendered it incapable of use. That consequently there was no ground for the pretext that the lessor had interfered with the beneficial enjoyment thereof by the lessee; and that though his acts might have amounted to a trespass, they did not constitute an *eviction*.
Peck v. Hiler, 117

2. Where the owner of land dies, leaving a widow and infant heirs, the widow becomes vested with the powers of a guardian in socage, and as such is authorized and required to take the rents and profits of the land for the benefit of the heirs. And the legal intendment would be that from the time of her husband's death, she occupied as guardian in socage. *Sylvester v. Ralston*, 286

3. If, during the minority of the heirs, the relation of landlord and tenant exists at all, in respect to their lands, it must be between the mother and the tenant; and if any action to recover rent, or for use and occupation, can be sustained, it must be brought by her, and not by the heirs. 117

4. Where it appears from the terms of a lease of a store in a building being erected by the lessor, and from the subsequent acts of the parties, that they understood the property rented was to be a finished store, fit for immediate occupancy for the purposes for which it was leased, a covenant in the lease, on the part of the lessor, will be implied, that the store shall be finished and fit for use as a store, by the time stipulated for the commencement of the term. *INGRAM, J. dissented. Lafarge v. Mansfield*, 345

5. Where lessees have never in fact taken possession of the demised premises as tenants, they can only be made liable for the rent, upon their covenants, as for a breach of an executory contract. 117

6. In such a case, to entitle the lessor to recover the rent, it is incumbent on him to show that he has performed on his part. 117

7. If the lessees have taken possession, so that they became vested with the

term, a breach of the agreement, on the part of the lessor, will constitute no defense to an action to recover the rent reserved. They can only recoup the damages actually sustained. 117

See USE AND OCCUPATION.

LEASE.

See HUSBAND AND WIFE, 5, 7, 8.

LIBEL.

1. It is clearly libelous to publish of another that he is "insane, and a fit person to be sent to the lunatic asylum;" or that "he is so disordered in his senses as to endanger the persons of other people, if left unrestrained, and that it is dangerous to permit him longer to go at large."
Perkins v. Mitchell, 461

2. The libelous character of such language will not be destroyed, or diminished, by the fact that the person uttering it is a *physician*, and makes the statement as a professional opinion. 117

3. To give to a statement made by a physician, which would otherwise be criminary and libelous, a privileged character, he must not only utter it as a medical man, but it must be made in the discharge of a duty, and to a person having a corresponding duty in reference to the subject matter. 117

4. A complaint alleging the publishing of words charging the plaintiff with being insane, without lawful authority or justification on the part of the defendant, need not aver special damage to the plaintiff. The obvious import and effect of such a charge being degrading and injurious, the court needs no averments to point out its tendency. 117

5. In England, and in the courts of this state, the rule has been very steadily adhered to which protects parties and witnesses for statements pertinently made by them in the assertion of their rights, or the discharge of their duties as such. 117

6. *It seems* this protection is not confined to the trial of issues in suits, or indictments, or to oral examinations, so as to exclude affidavits even if voluntarily made, if otherwise regular and pertinent. *ib*

7. Whenever a person testifies, either voluntarily or under process of subpoena, to matters pertinent and material, in a proceeding before a court or magistrate of competent authority, he is entitled to unqualified protection against any action for defamation by the words thus uttered. *ib*

8. It is not libelous, or actionable as such, for a physician to furnish evidence, either voluntarily or under a subpoena, that another is insane, in a proceeding duly taken under any of the clauses of the statute relative to the safe keeping and care of lunatics. *ib*

9. To sustain a demurrer to a complaint for libel uttered under such circumstances, it is necessary that it should appear distinctly, by the complaint, that the alleged libel was contained in an affidavit made in a proceeding properly and legally instituted under the statute referred to. The complaint must state all the facts which the defendant would be obliged to plead in setting up his privilege; in order to show that the plaintiff has no cause of action in the publication of a charge which in itself is clearly libelous. *ib*

10. Although, where a man is called to testify, or even makes an affidavit, in a cause depending in a court of competent general or ordinary jurisdiction and proceeding according to the course of the common law, he may not be required to know, or to prove, that all the facts existed, or all the steps had been taken, which were necessary to confer jurisdiction in the particular case, yet where one intervenes voluntarily, in a special proceeding not known to the common law and not resulting in a judgment according to its forms, he must see that jurisdiction is acquired, and that there is in reality a proceeding in court, before he can claim the privilege of a witness for libelous charges against another. *ib*

LIMITATIONS, STATUTE OF.

1. Although technically, and strictly, the words of the 22d section of the statute of limitations, respecting the time for commencing actions against sheriffs, &c. for official acts, do not apply to proceedings as for contempts to enforce civil remedies, yet in its spirit and intent that section does apply to such proceedings. *Van Tassel v. Van Tassel*, 439

2. The court has the power to withhold, and should withhold, the exercise of its jurisdiction in summary proceedings on motion, whenever an action for the claim sought to be enforced is barred by force of the statute of limitations. *ib*

3. For the omission of a sheriff to pay over to the county treasurer the proceeds of a sale of lands in a partition suit, the period of limitation begins to run at the time the omission occurs, and not from the time when the party in interest becomes apprised of his right of action. *ib*

LIS PENDENS.

See ACTION, 1, 2.

M

MEDINA, VILLAGE OF.

See CONSTITUTIONAL LAW, 5, 6.

MORTGAGE.

1. Where the owner of premises, leased by him for a term of years, at an annual rent of \$1500, executed a mortgage thereon to W. who assigned the same to the plaintiff, and the mortgagor, subsequently and before the mortgage debt became due, assigned to T. \$4500 of the rent first to accrue on the lease, of which assignment the plaintiff had notice; *Held*, in an action to foreclose the mortgage, that as between T. and the plaintiff, T. was entitled to the rents and profits of the premises, which accrued between the time when the mortgage debt became due and the time of the appointment of the receiver in the foreclosure suit; although it appeared that the mort-

gagor was insolvent, and the mortgaged premises were an inadequate security for the mortgage debt. *Syracuse City Bank v. Tallman*, 201

2. Unless there be a special clause to that effect, in a mortgage, the mortgagee has no lien upon the rents and profits; and as a general rule the mortgagor, until the sale, is entitled to remain in possession. *ib*
3. But courts of equity, under certain circumstances, will, after default, in an action for foreclosure and sale, anticipate the final judgment by the appointment of a receiver, and in effect put the mortgagee in possession and allow him to divert the rents and profits of the mortgaged premises from the hands of the mortgagor, and hold them as additional security for the payment of the mortgage. *ib*
4. To entitle him to this relief it must appear that the mortgaged premises are an inadequate security for the debt, and that the mortgagor, or other person liable for the mortgage debt, is insolvent. *ib*
5. This relief does not grow directly out of the relations of the parties, or the stipulations contained in the mortgage, but out of equitable considerations alone. It is not a matter of strict right, but is addressed to the sound discretion of the court. *ib*
6. It seems that when the mortgagor is insolvent, and fails to pay, at the day appointed, and the mortgaged premises are an inadequate security, as between the mortgagor and mortgagee, it is within the equitable discretion of the court to allow the latter to intercept the rents and profits, for his better protection from loss. And that this is the utmost extent to which the relief has been granted, or to which it can be granted, within any admitted principle of equity. *ib*
7. Where a third person took, for a valuable consideration, an assignment of the rents of mortgaged premises, before any default had occurred in the payment of the mortgage debt, and before there was any reason to anticipate that the mortgagor would become insolvent; *Held* that his

equity was superior to that of the mortgagee, upon the mortgaged premises proving inadequate to the payment of the mortgage debt. *ib*

8. The condition of a mortgage was that the mortgagor should pay "the just and full sum of all moneys" which he might owe to the mortgagees, either as maker or indorser of any note or notes, or any bills of exchange, bonds, checks, overdrafts or securities of any kind, given by him, according to the conditions of any such writings obligatory executed by him to the mortgagees as a collateral security." *Held* that the instrument called for written evidences of debt, signed or indorsed by the mortgagor, and could be satisfied by no other; and that it could not be made available as a security for a debt not in writing. *Walker v. Paine*, 218
9. *Held also*, that in the absence of any misrepresentation of facts, upon which the holder of the mortgage or any person through whom he claimed, had been induced to act or to withhold action, to his detriment, the mortgagor was not *estopped* from denying the existence of such a written security as would answer the condition of the mortgage. *ib*
10. In an action to compel a mortgagee to cancel and discharge of record a usurious and void mortgage which has been recorded, it is sufficient for the plaintiff to set out in his complaint the execution and delivery of the mortgage, upon his real estate, in pursuance of a usurious agreement, and that the same was duly recorded; without any reference to the question of a defense at law. *SMITH, J. dissented. Williams v. Ayrault*, 864
11. Such a mortgage, being upon record, and apparently valid, though in fact void, is a cloud, which a court of equity should aid in removing. *ib*
12. If all the facts are alleged, which constitute a cloud upon the title, that will be regarded as sufficient, although the term cloud is not used in the complaint. *ib*

See JURISDICTION, 4, 5, 6.

MUNICIPAL CORPORATIONS.

A municipal government may be authorized to pass ordinances imposing new and superadded penalties for acts already penal by the laws of the state. *City of Brooklyn v. Tynnes*, 282

MUTUAL INSURANCE COMPANIES.

1. A receiver of a mutual insurance company, in making an assessment upon the premium notes held by the company, is the actor, and his authority depends, not upon the order of the court, but upon the existence of the facts rendering an assessment necessary and proper. *Thomas v. Whallon*, 172
2. In ordering a receiver to make an assessment upon the premium notes, the courts do not adjudicate upon the liability of the company, or determine the amounts for which assessments shall be made, or the ratio of assessment. They merely sanction and authorize the acts of the receiver, who acts ministerially, not judicially. *ib*
3. The assessment is the act of the receiver, and in and with him is the authority to act in the premises. *ib*
4. The promise of the assured is to pay upon certain conditions, and the existence of those conditions must be shown by the party seeking to enforce the contract. *ib*
5. The directors of a company, or the receiver if one be appointed, have no arbitrary discretion in making an assessment, but they are controlled by the explicit provisions of the statute, and must, by proper averments and proof, bring themselves within the terms of those provisions before they can enforce the collection of the premium note. *ib*
6. Where, in an action by a receiver, to recover the amount of an assessment made by him upon a premium note, there was no averment in the complaint, and therefore no foundation laid for the introduction of evidence, of the liabilities of the company, and there was no proof of the existence of any liabilities for the payment of

which an assessment was necessary; *Held* that the plaintiff could not recover. *Bacon, J. dissented.* *ib*

N

NEGLIGENCE.

1. Where a person, while traveling in a public stage coach, receives an injury, in consequence of the carelessness and negligence of another, and brings an action to recover damages for the injury, the plaintiff is chargeable with the negligence, if any, of the driver of the stage; and, for the purposes of the action, such negligence of the driver is to be regarded as the negligence of the plaintiff. *Brown v. New York Central Rail Road Company*, 385
2. Where it is not entirely clear, from the evidence, in such an action, that the negligence of the driver contributed to the injury, the case should be submitted to the jury, for their determination. *ib*
3. R. was a day laborer, employed continuously upon the track of the defendants' rail road, at a fixed rate of wages per day, with an understanding that the defendants were to be at liberty, after the expiration of R.'s regular hours for labor, to require his services in case of any accident, or the occurrence of any thing endangering the running of the road, when he was to be allowed for extra time, and paid accordingly; and that if, at any time after he had performed his day's labor, he saw any thing amiss, he should, without being specially required to do so, give all necessary attention to it. *Held* that the negligence of R. in taking down, and failing to replace, a set of bars in the fence of the defendant, opposite the plaintiff's land, in consequence of which the horses of the latter strayed upon the track of the rail road, in the night, and were killed by the locomotive, was the negligence of the defendants, for which they were liable in damages. *Chapman v. New York Central Rail Road Company*, 399

See ACTION, 5, 6.

NEW YORK, CITY OF.

1. The act of the legislature, of April 19, 1869, "to enable the supervisors of the city and county of New York to raise money by tax," was not unconstitutional as containing matters not embraced in its title. *Sharp v. Mayor &c. of New York*, 572
2. The statute does not require that the comptroller, upon an application made by him, under the 5th section, to open and reverse a judgment obtained against the city by collusion or fraud, shall show by affidavit the grounds on which his opinion, of the existence of collusion or fraud, is formed. 5b
3. The act being one for the benefit of the public, and intended to prevent fraud, should be liberally construed. 5b
4. The making of the application by the comptroller, he being a sworn officer of the city, should be considered sufficient evidence, in itself, that he has reason to believe the cause exists which the statute requires, to warrant his action. 5b
5. An allegation, by the comptroller, in his affidavit, that he believes that the claim upon which the action is based, is unfounded and fraudulent, is amply sufficient to enable him to take the necessary steps to move the court as provided for in the statute. 5b
6. Although the legislature has conferred on the department presided over by the corporation counsel, in the city of New York, the management of all civil actions brought by and against the city, and he is therefore not bound to conform to the directions of either the mayor or comptroller, nor to follow their advice, yet the right conferred upon the corporation counsel does not place him beyond the control and direction of the court, if it appears that his action, or omission to act, is injurious to the city. *Sharp v. Mayor &c. of New York*, 578
7. It is the right of the city officers to apply to the court for protection, and it is the duty of the court to grant it, if it is made to appear that the conduct of the counsel is prejudicial to the rights of the city. 5b

8. Where, upon an application made by the comptroller of the city of New York, to set aside a judgment obtained against the city for over \$40,000, on the ground of fraud and collusion, it appeared from the affidavit of the comptroller that the claim on which the action was based was unfounded and fraudulent, and that a good defense existed against the same; and it was shown that the corporation counsel had omitted to prove important facts upon the trial which it was his duty to prove; that the questions arising in the case were so important, and involved in so much doubt, as not only to justify but to require counsel to take the opinion of the general term upon them; but that although the comptroller and the mayor had, after the rendition of the judgment, applied to the corporation counsel to appeal from the same, to the general term, he had refused to do so; it was held that a judgment recovered under these circumstances should not be permitted to stand; and the same was ordered to be set aside. 5b

NOTICE.

See CHATTEL MORTGAGE, &c.

NUISANCE.

See BOARDS OF HEALTH.

P

PARENT AND CHILD.

1. Where a daughter, immediately upon her arrival at lawful age, makes a voluntary conveyance for the benefit of her father, the transaction will be examined by the court with the most jealous scrutiny and suspicion. *Bergen v. Udall*, 9
2. The person relying upon the conveyance must show affirmatively, not only that the one who made it understood its nature and effect, and executed it voluntarily, but that such will and intention was not in any degree the result of misrepresentation or mistake, and was not induced by the exertion for selfish purposes, and for his own exclusive benefit, of the influence or control

which the father possessed over his daughter. cb

3. There is no law against a child bestowing upon a parent any property, of which she may be the owner, because she loves him, and desires to promote his interests. But there is an inflexible principle both of public policy and private justice which forbids a parent making use of his influence, or his child's affection, to impose upon her mind a purpose of bounty to him. cb
4. If the design to make the gift originated in the mind of the child, or was at least unsuggested by any agency of the parent, the act is as unimpeachable in law as it may be laudable in morals. But if the mind of the donor was brought to a purpose preconceived by the parent for his own sole advantage by an influence which the donor could not escape, in the circumstances in which she was placed, and which is deliberately used to effect such a purpose, then that influence, or its exercise, will be held to have been undue and improper. cb
5. In all dealings between parent and child, under such circumstances, the most scrupulous good faith—*uberri-ma fides*—must be observed; and the weaker party must be put upon an equal footing with the stronger, by a complete disclosure of all material facts, and the abnegation, as far as possible, of any control or dominion, as well as of all mere selfish projects or attempts. z
6. U. being the owner of a tract of land lying on the west side of a certain brook, and the plaintiff, his daughter, an infant under 18 years of age, being the owner of a farm lying opposite, on the east side of the same brook, U. offered to sell to B. a part of his land lying immediately adjoining the brook, but B. refused to purchase the same unless, together with the land, he could secure the right to construct a dam across the stream, so as to pond back the water and overflow the land of the plaintiff. U. thereupon conveyed to B. a part of his said farm lying on the west side of the brook, for the sum of \$17,500, together with the right to B. in perpetuity, to construct across

said brook a dam five feet in height, and covenanted in the deed, that the plaintiff should, within six months after arriving at the age of 21 years, grant and secure to B. in perpetuity the right to construct, maintain and keep the said dam; the sum of \$4000, the estimated price or value of the privilege, being secured to be paid by B.'s bond and mortgage, payable when the plaintiff should, after arriving at the age of 21, execute a deed of confirmation in respect to such privilege. The plaintiff, by a deed dated the same day the deed from U. to B. was executed, conveyed to B. the right and privilege to make a dam across said brook and thereby to submerge her land. This was done with the advice of her counsel, and with the understanding that she could ratify or disaffirm the act when she should reach the age of 21. When she became of age she made no attempt, and gave no indication of a purpose, to complete the gift. On the contrary, upon an officer coming to her father's house to take her acknowledgment to a conveyance of the privilege, she refused to execute the paper. A week later she again declined executing it. Being subsequently thrown from a wagon she was somewhat hurt, and a good deal frightened. While still unwell and hysterical, her father came to see her, accompanied by Mrs. C. the mother of the second wife, who was selected by U. on account of her supposed influence over the plaintiff. Mrs. C. urged her, strongly, to execute a deed of confirmation; telling her it was her duty to her father to do so, and speaking of his necessities. And, carefully ignoring the plaintiff's own rights and interests, Mrs. C. urged that if she refused to sign the deed, no one would be benefited but B., and that the question for her to determine was whether she would benefit her father, or B. The plaintiff finally told U. that if he would secure the sum of \$4000, to be paid to her brother and sister, at his death, she would confirm the deed. She was informed by U. that he had made a will, and given them more than that amount; and supposing that the \$4000 which her compliance would be the means of procuring from B. would be effectually secured to her brother and sis-

ter, at her father's death, she at length executed a deed of confirmation. *Held* that the deed, thus obtained, was not the result of the deliberate, unaided and uncontrolled action of the plaintiff's own mind, but was procured by the agency of means and motives, and the suggestions of others. That it was not to be regarded, and could not therefore be maintained, as an act of pure bounty, proceeding merely from the natural affection of a child for a parent; but was the result of a purpose which she was led by others to form; that the plaintiff was therefore entitled to relief against the deed; and that the same should be set aside, unless U. should pay to her the sum stipulated and agreed upon by B. as the price of the privileges to be conveyed to him by her; or, the fair value of the rights and privileges conferred by her deed of confirmation. *cb*

7. *Held also*, that a deed thus obtained from a grantor, young and inexperienced, not yet emancipated from the natural influence and control of her father, without discreet advisers, whom she could consult, and surrounded by those who were either under the control and influence of her father, or who were actively assisting his purpose and laboring for his interests, the grantor being ill, at the time, could not be sustained; notwithstanding the evidence fell short of showing either gross intentional misrepresentation and fraud, or threats and coercion, on the part of the father. *cb*

See SEDUCTION, 1.

PARISH.

See RELIGIOUS SOCIETIES.

PARTIES.

1. In an action to recover damages for fraud and deceit on a sale of stock to the plaintiff, by the defendant through one H. as his agent, and to enforce the plaintiff's lien as vendor upon the land conveyed by her in payment for such stock, it appeared that H. acted only as the agent of the defendant; that the stock purchased by the plaintiff was in fact purchas-

ed of the defendant, and that the land conveyed by the plaintiff was received by H. for the defendant, and subsequently, and before suit brought, conveyed to the latter. *Held* that H. was not a necessary party. *Newbery v. Garland*, 121

2. An action brought by a married woman, for fraudulent representations, whereby the plaintiff was induced to sell, and part with, certain lands of which she was seised to her separate use, and in which she had a separate estate, and with this separate property to purchase certain worthless stock, relates to her separate estate, and is properly brought by her alone, without joining her husband. *cb*
3. The code does not give to a defendant the right to object to the nonjoinder of a party, unless he pleads or gives notice of the defect. *Abbe v. Clark*, 288
4. If no notice of the defect is given, the objection is not available, except upon the question of damages. *cb*
5. Where two partners have a right of action against a third person, for a tort, and one of them assigns his right and interest in the claim to the other, who sues thereon, in his own name, if the defendant omits to set up the nonjoinder of the other partner, in his answer, or to give notice of the defect, he cannot insist upon the nonjoinder as a defense, upon the trial. *cb*
6. And assuming that such an assignment is invalid, and that the right of action remains in both partners, yet it is not a case for apportioning the damages; but the plaintiff is entitled to recover the entire sum awarded. *cb*
7. Where a plaintiff is entitled to the relief asked for as against the property of a married woman, it is proper to make her husband a party defendant, with her. And if he is so joined, he cannot demur separately to the complaint on the ground that it contains no cause of action against him. *Goelet v. Gorr*, 814

See CORPORATIONS, 3.
DESCENT.
TRUSTS.

PARTITION.

See JURISDICTION, 1, 3.

PARTNERSHIP.

1. The plaintiffs and defendants entered into a partnership for the manufacture and sale of a certain medicine, by a written agreement, which provided that the partnership should continue ten years, unless the plaintiffs desired to terminate it sooner; which they were permitted to do, by a notice for that purpose; and that on a dissolution the recipe for making the medicine should be sold at public auction to the highest bidder of the parties. On the 5th of March, 1859, the plaintiffs gave the defendants notice that the firm was dissolved, and that the recipe, trade-mark, &c. would be sold at public auction, by B., an auctioneer, at the Merchants' Exchange, on the 8th of March. On that day the property was sold, and was struck off to the plaintiffs, who bid \$100 therefor. One of the defendants was present, but declined bidding, and refused to concur in the sale. *Held* that the partnership agreement contemplated a friendly dissolution, and a sale at auction of the trade-mark, &c. by mutual consent, and that the parties should bid therefor among themselves. But that no authority was given to either party to fix the time or place of sale, or to select an agent to make it; and that the plaintiffs obtained no title under the sale made by their own auctioneer, without the concurrence of the defendants. *Comstock v. White*, 301
2. *Held also*, that in case either party refused to unite in a friendly sale at auction, it was competent for a court of equity to enforce a performance of that clause in the contract, and compel a sale. *ib*
3. And, the necessary facts being alleged, to enable the court to afford the proper relief by directing a sale of the interests at auction, by a referee appointed by the court for that purpose, the complaint was ordered to be amended by inserting the proper demand for such relief. And in case of the plaintiffs' declining so to amend, leave was given

to the defendants to amend their answer by demanding such relief by way of counter-claim. *ib*

See JUDGMENT, 2, 3.
PARTIES, 5, 6.

PATENTS FOR LAND.

1. A patent can always be proved by a *constat*, or an exemplification of the record, as well as by producing the patent itself. *McKineron v. Bliss*, 180
2. If the patent cannot be produced, the proper evidence of it is an exemplification from the appropriate offices in England, or proof that upon application to those offices no record was to be found. *ib*
3. A party claiming under a patent from the king cannot, after proof of fruitless searches made in the state offices of this state, and in several county clerks' offices, for the patent, be allowed to ask a witness what is reported among the settlers on the tract to have been the disposition made of the letters patent. *ib*

See GRANTS.

PAYMENT.

1. The plaintiff remitted to the defendant a draft for \$400, by mail, informing him, at the same time, that he might use it, if he would extend the time for the payment of a certain mortgage for \$8000, which the defendant held, then overdue, for the period of one year. The plaintiff was under no personal liability to pay the mortgage. The defendant kept the draft, but declined to stay proceedings on his mortgage unless he received a further sum of \$1100 on account of the mortgage, within fifteen days. *Held* that the plaintiff had a right to impose any condition upon the application or use of the money by the defendant; and that the latter could make no application or use of the money while disregarding the condition. That he must return the money, or else be held to have accepted the condition. *Grisman v. Platt*, 328

2. *Held also*, that the plaintiff was not to be driven to his remedy at law, but was entitled to an injunction to restrain the prosecution of a foreclosure suit. ib

PERSONAL INJURIES.

See ACTION, 5.

PHYSICIAN.

1. The law implies an undertaking, on the part of a physician or surgeon, that he has ordinary skill, and that he will execute the business intrusted to him with ordinary care and skill. If he fails in this duty, he is guilty of a default in his undertaking, and cannot collect the pay for his services, but is liable in damages to the person who employed him. *Bellinger v. Craigus*, 584
2. Where a physician was employed to treat a broken limb, and made several visits in the course of his employment; *held* that the contract was *entire*, and that performance must be shown, to entitle him to recover any thing for his services. ib
3. In the absence of evidence that the physician has failed in his duty, *it seems* that performance will be inferred, upon the principle that the law will not presume a party guilty of a breach of duty, or of negligence or fraud. ib

See LIBEL.

PLEADING.

1. A fact impliedly averred, may be traversed in the same manner as if it was expressly averred; and the general denial, of the code, puts all the allegations of the complaint in issue, whether expressed or implied. *Bellinger v. Craigus*, 584
2. Where a physician sued a party, before a justice of the peace, for services rendered by him in treating a broken limb, and the defendant appeared and put in an answer containing a general denial; *held* that the fact of performance of the con-

tract, by the plaintiff, was impliedly averred in the complaint and denied by the answer; and that the judgment of the justice in favor of the plaintiff, for his services, necessarily included the fact of performance on the part of the plaintiff, so that it could not be again litigated between the same parties. ib

3. Where a defendant went to trial, in a justice's court, on his general denial of a complaint for professional services as a physician, and withdrew all claim for *malpractice*; *held*, nevertheless, that the question was necessarily included in the issue, and determined by the judgment. ib
4. A claim for damages for *malpractice*, in such a case, is not *new matter*. New matter admits the plaintiff's demand, but such a claim denies its existence altogether. ib
5. It is not a *counter-claim*. Strictly speaking, where the plaintiff has no claim, the defendant cannot have a counter-claim. ib
6. The two claims, in such a case, cannot co-exist; and a recovery by either party will effectually bar the action of the other party. ib

PRACTICE.

1. In an action on a policy of insurance, the plaintiffs, in their complaint, made a claim under the policy, for a loss, and also alleged facts showing that an error had occurred in making out the policy; and they demanded judgment for the amount of the loss, and in case it should be necessary to the recovery, for such further judgment as should be proper. *Held* that both legal and equitable relief was prayed for, and that the cause should have gone to the circuit, for a trial before a jury, where the judge could have granted the relief asked for, and then submitted the other questions to the jury. *New York Ice Company v. North Western Ins. Co.* 72
2. But the parties having brought the cause on for trial as an equity case, at a special term, upon the question as to the right of the plaintiffs to

- have the policy reformed, on the ground of mistake in drawing it, and the testimony in regard to the mistake being conflicting, and the weight of evidence against the plaintiffs, and showing that the contract was made under a mutual mistake of the parties, but that no mistake occurred in filling up the policy; *Held, further*, that the plaintiffs were not entitled to the relief asked for. *ib*
8. *Held also*, that the plaintiffs having tried their action before a judge at special term, without a jury, as an equity case, and having failed there, in obtaining the equitable relief sought, the special term had no authority to try the right of the plaintiffs to recover for a loss, under the policy as it was drawn, or to send the case to a jury, for a second trial. *ib*
4. A decision of the court, at the trial, imposing terms, as a condition of granting leave to amend an answer, will be deemed to be acquiesced in, unless an exception is taken, at the time. *Griggs v. Howe*, 100
5. A motion to set aside a nonsuit, upon a case, cannot be made, if the case nowhere shows whether the trial was with or without a jury. In such a case, the only method of reversing the rulings at the circuit is by appeal. *Cronk v. Canfield*, 171
6. A judge, at the circuit, has no power to order a case to be heard at general term. He can only order the exceptions to be so heard. *ib*
7. Where no specific exception is taken to the rulings of the judge, as they occur during the trial, but at the close of the case there is a single exception to all the rulings, the exception cannot be sustained unless *all* the rulings are erroneous. *ib*
8. A defendant, on a trial before a referee, set up a defense which, though valid, was not within the issue presented by the pleadings, and was not a mere variance in some particular, but in the entire scope and meaning of the defense. No amendment was asked for, or made; and no objection to the evidence was made, until the close of the trial, the parties consenting that all objections to the evidence might be reserved until that time. At the close of the trial, the plaintiff objected to the evidence, as not being within the issue. *Held* that the objection was valid, and should have been allowed. *Bacon, J. dissented. Johnson v. McIntosh*, 267
9. *Held also*, that the erroneous ruling of the referee, in receiving the evidence, was not cured by a subsequent order of the court, allowing an amendment of the answer. *ib*
10. *Held further*, that the order allowing the defendant to amend his answer was erroneous. *ib*
11. When an action has been referred, and tried by the referee upon the facts, and a report made by him, and a new trial is ordered, it is not, ordinarily, proper to send it back to the same referee. *Sharp v. Mayor &c. of New York*, 578
12. The general practice is, to vacate the order of reference, on granting a new trial, on the application of either party, and to refer it to a new referee, if the cause is referable, or to retain it in court if it is not. *ib*
13. Whether a referee shall be retained or removed, when a new trial is ordered, is a question addressed to the discretion of the court; and from the decision thereon no appeal lies, *it seems*. *ib*
14. When a cause is referable only on consent, and the court sees fit to take it from the referee appointed therein, it cannot supply the vacancy. Hence the case must go back upon the calendar, or be deemed and treated as an arbitration. *ib*

PRESUMPTION.

See WIDOW.

PRINCIPAL AND AGENT.

1. Forwarders and warehousemen are, like other agents, bound by the directions of their principals. The directions constitute a part of their authority, and operate as a limit upon it. *Johnson v. New York Central Rail Road Co.*, 196

R

RAIL ROAD COMPANIES.

2. Any unnecessary deviation or departure from the instructions is at the peril of the agent, and renders him liable for any loss resulting from it. 5b
3. But a deviation from the course marked out by the principal, which is rendered necessary by the circumstances of the case, which were not foreseen by the principal, is justifiable, if the agent exercises the care and skill which the character of his agency calls for; unless the instructions amount, in substance, to a prohibition of the act in any other than the prescribed method. 5b
4. The plaintiffs shipped, at Little Falls, on the defendants' cars, certain goods consigned to a person in New York, with directions to the defendants to forward from Albany by the "People's Line" of steamboats. On the arrival of the cars at Albany the People's Line refused to take the freight. The navigation of the Hudson river being about closing, the defendants shipped the goods by the Eckford line of tow boats, a responsible line and in good reputation, which was the usual mode of conveying freight, of that kind. The property being lost on its passage from Albany to New York, by the perils of navigation; it was held that the defendants, in consequence of the refusal of the People's Line to carry the freight, were in possession of it as forwarders, without any directions as to the route or means of conveyance, and were therefore bound to exercise their discretion, and select the best that presented; that the established usage and course of business became the rule of duty governing them; and that having forwarded the goods by the customary method, they were not liable for the loss. 5b

See CONSIGNOR AND CONSIGNEE.

PRIVILEGED COMMUNICATIONS.

See LIBEL.

PROPERTY.

Whether real or personal. See RAIL ROAD COMPANIES, 8, 9, 10, 11.

1. Whether a rail road corporation is to be considered as resident, for purposes of taxation or otherwise, in each county through which its road runs, or only in the city where its principal business office is situated? *Quare. People ex rel. Hudson River Rail Road Company v. Pierce*, 188 5b
2. Under the first section of the act of 1837, which directs commissioners of highways in apportioning the residue of the highway labor to be performed in their town, after assessing one day's work upon every male inhabitant of full age, "to include among the inhabitants of such town, among whom such residue is to be apportioned, all moneyed or stock corporations which shall appear on the last assessment roll of their town to have been assessed therein," the commissioners must follow the previous action of the assessors. They are not to assess such corporations as are situated in their town, or such as may properly be considered inhabitants of such town. They are to take the last assessment roll for a guide, and to include in their assessment every corporation which they find assessed therein; and they cannot tax, by name, as an inhabitant of the town, any corporation which is not so assessed upon that roll. 5b
3. The act intended these corporations should be included among, and treated as inhabitants, for all its purposes. 5b
4. When the proceedings for the organization of a rail road corporation are regular upon their face, and the company, while in the actual exercise of all its corporate functions, is recognized by the legislature as a corporation, it becomes, by such recognition, *ipso facto*, a legal corporation. *Black River and Utica Rail Road Co. v. Barnard*, 258 5b
5. Any defect, or irregularity, in the proceedings required by law to be taken for its organization, should be deemed to be waived by such recognition. 5b

6. The power which prescribes the formalities to be observed in order to create a corporation, is able to dispense with them. cb
7. Where the articles of association of a rail road corporation were in proper form, and properly authenticated and certified, and so far as such articles were concerned, all the requirements of the statute had been complied with; and the company had assumed corporate functions, built a portion of its road and gone into actual operation, and had been doing business some five years; the defendant being one of the directors and acting as such for several months; and the legislature had, by three several acts, distinctly recognized its corporate existence; *Held*, in an action by the corporation to recover calls upon its capital stock, that it was to be deemed a legal corporation, and authorized to sue, as such. cb
8. As between mortgagees and judgment creditors or purchasers, the rolling stock of a rail road company — such as locomotive engines, tenders, passenger, freight or other cars, shop-tools and machinery — is *personal estate*; and will not pass as *real estate*, or fixtures, under a mortgage executed by the company; nor can it be held by the mortgagee by virtue of his mortgage, as personal estate, unless he has caused such mortgage to be filed as a *chattel mortgage*, according to the provisions of the statute relating to chattel mortgages. *Stevens v. Buffalo and New York City Rail Road Company*, 590
9. If a subsequent judgment creditor levies upon such rolling stock, and sells the same, by virtue of an execution issued upon his judgment, the purchaser will be entitled to hold the same, discharged of the lien of the prior mortgage. cb
10. Notice to a judgment creditor, of an existing mortgage, is no answer to his objection that the mortgage has not been filed. cb
11. Locomotive engines, and other rolling stock of a rail road company; the stock, materials, rails, ties and other things on hand for running or

repairing the road; the platform scales, tools and implements; and all articles not constituting a part of the road bed, or firmly affixed to the land, or some building which is itself a fixture; including such articles as are usually denominated chattels, but which are annexed by a screw or the like to some building, and which can be removed without detriment to the building, are not embraced in, and will not pass by, a mortgage of the *rail road, real estate, chattels real and franchises* of the company; but are subject to execution, as *personal property*. *Beardsley v. Ontario Bank*, 619

See AGREEMENT, 3.
CARRIER, 1, 2, 3.
NEGLECT, 3.

RECEIVER.

See CORPORATIONS.
MUTUAL INS. COMPANIES.

REFEREE.

1. No referee should proceed a step in the exercise of his duties without a certified copy of the rule or order appointing him, in his hands. This is his commission, and without it he should not proceed to act. *Per BROWN, J. Bonner v. McPhail*, 107
2. The power of a referee to administer a judicial oath can only be derived from an order of the court appointing such referee. A memorandum "referred to L. K. M." made by the judge on his calendar, at the circuit, is not sufficient to constitute an order. An entry at least in the minutes of the court is required for that purpose. Some action of the court, shown by its records, is necessary. cb
3. An order of reference, made after the report of the referee is filed, with the consent of both parties that it be entered *nunc pro tunc*, will not relate back, so as to give to an extra-judicial oath the effect of an oath legally administered, on which a charge of perjury can be sustained. cb
4. The city court of Brooklyn, being a court of special and limited juris-

diction, a referee appointed by it has no power to try a cause in the city of New York. *ib*

See PRACTICE, 11 to 14.
USURY, 4, 5, 6.

RELIGIOUS SOCIETIES.

1. It is not a ground of objection to the calling or settling of an individual as rector of a Protestant Episcopal parish, that his salary was not fixed by a vote of the congregation, according to section 8 of the act to provide for the incorporation of religious societies. *Youngs v. Ransom*, 49
2. That provision of the statute has no application to congregations of that denomination. *ib*
3. If a vestry possess the power to settle a minister and fix his salary, a call, made by the wardens and a majority of the vestry addressing a written invitation to an individual to become their rector, and fixing his salary, followed by acceptance, and by mutual action and acknowledgment of its validity and of the relation thus created, cannot afterwards be disregarded or denied. *ib*
4. A call to a parish, and its acceptance and a consequent entry upon the duties of the office of its minister, are all which we have, in this country, resembling the presentation, admission and induction of the English church; and neither these terms, nor the ceremonies indicated, are known to our law as applicable to any of our churches. *ib*
5. The congregation, in the manner indicated by the law of the land, and, in the case of Episcopal churches, by their vestry, call a clergyman to exercise his functions in their parish, and fix his compensation. If he accepts the call and enters upon his office, there is no ceremony which is required or can be performed, to add force or efficacy to these mutual acts, unless it be by reason of some special requirement of the discipline of a particular church. "Induction," in the sense in which it is used in English eccle-

siastical law, cannot be employed here. *ib*

6. If every other requisite for the due and proper settlement of an individual as rector of a parish is complied with, the absence of the ceremony of "institution" will not prevent his being such; unless that is the positive rule of the ecclesiastical body to which he and they belong. *ib*
7. There is no such thing known to our law, as institution or induction; and the ecclesiastical law of England is no part of the law under which we live. *ib*
8. The effect or necessity of what is called "institution," depends upon the customs and regulations of the Episcopal church; and is therefore a question of fact, and not of law. *ib*
9. Before our courts can take notice of the customs of a particular denomination or body of christians, or their nature or effect, or of any rights or disabilities resulting from their observance or neglect, the existence of the customs must be properly averred, and proved, as matter of fact. *ib*
10. Where a minister is called to, and settled in the charge of, an Episcopal parish, unless something to the contrary is distinctly expressed in the call and settlement, he cannot be dismissed without his consent, except by the bishop of the diocese. *ib*
11. The rule or regimen of the Episcopal church, as to the tenure of its parish ministers, is, that when they have once been placed in charge of congregations, they can neither leave nor be dismissed, except by mutual consent, without the intervention of the bishop. *Per Emorr, J.* *ib*
12. A court of equity will not interfere by injunction to eject a clergyman from his possession of the church and to forbid his preaching in it, where he is in office, placed there originally by the act of the parish, and claiming to be rightfully there, and there is no other person claiming the office, or with whose rights as a minister of the parish the defendant is interfering; and where there is no occasion for a breach of

the peace, or a conflict between two clergymen or their adherents, in conducting the worship of the congregation. *ib*

ROLLING STOCK.

See RAIL ROAD COMPANIES, 8 to 14.

S

SCHOOL TAX.

See COMMON SCHOOLS.

SEDUCTION.

1. Although the law does not clothe a stepfather with the rights of a parent, growing out of that relation alone, yet where a person adopted the illegitimate daughter of his wife, into his family, and she was bred and brought up by him, *it was held* that he stood *in loco parentis* towards her, and could maintain an action for her seduction. *Bracy v. Kibbe*, 273
2. In such an action it is competent to show the circumstances under which the female was seduced, and the means used for corrupting her mind. *ib*
3. Evidence of previous lascivious conduct on the part of the girl is admissible. *ib*
4. Where the female seduced, on her examination as a witness, swears that she had been induced to charge the child upon another person, by promises from the defendant, it is competent for the defendant to show that she not only said the child was not the defendant's, but that she went further, and said that she had been induced to charge it upon the defendant by the plaintiff and others, members of his family. *ib*
5. It is improper to admit evidence of the reputed good character of the female, when her general reputation has not been attacked. *ib*
6. A master can maintain an action for the seduction of his servant, although pregnancy did not follow the illicit intercourse, if there is proof, sufficient to be submitted to the ju-

ry, of a loss of service, as the result of the seduction. *White v. Nellis*, 279

SET-OFF.

See ASSIGNOR AND ASSIGNEE.

SHERIFF.

1. Where a defendant is arrested by the sheriff, upon an order of arrest, and gives bail and is thereupon discharged from custody, but the bail do not justify, the sheriff himself becomes bail, and is liable in the same manner, and to the same extent, as bail to the action would have been, had such bail been given and perfected. *Metcalf v. Stryker*, 62
2. Hence, if the plaintiff obtains a judgment in the action, and an execution issued thereon, against the property of the defendant, is returned unsatisfied, and an execution against the body is returned *non est*, the sheriff is liable to pay the amount of such judgment with interest. *ib*
3. The sheriff's liability being fixed by the original judgment, evidence of the insolvency of the judgment debtor is immaterial, in an action to enforce that liability, and should be rejected. *ib*
4. It is a clear breach of public duty for a sheriff, in any case, to suffer the attorney of the plaintiff to take into his hands the proceeds of a sale and to deal with and dispose of them at his pleasure and at the time most suitable to his convenience. *Van Tassel v. Van Tassel*, 489
5. In sales in actions for the partition of lands, the foreclosure of mortgages, or to carry the trusts of a will or deed into execution, where numerous other persons are interested, and entitled to share in the proceeds, besides the plaintiff, the officer fails in fulfilling his official obligations if he suffers the purchase money to pass into hands other than his own. *Per Brown, J.* *ib*
6. Whenever such a case occurs, the courts can do no less than hold the sheriff to a rigorous accountability. *ib*

7. Where a sale of lands under a decree in a partition suit was conducted and the lands were offered for sale, and sold, by the plaintiff's attorney, in the name of the under sheriff, the attorney delivering the deeds to the purchasers and receiving the purchase money, with the assent of the under sheriff, who was not present at the sale, but who subsequently executed the deeds, and signed the report of the sale; *Held* that the under sheriff must be deemed to have acted, in the matter, through the attorney, and to have ratified and affirmed all that he did touching the sale; and to have received the proceeds of the sale into his own hands, and to have incurred the usual liability therefor. *eb*

8. *Held also*, that the sale and conveyance of the lands mentioned in the judgment being an official act, the sheriff himself was liable to the parties entitled to the proceeds, for their respective shares thereof, upon a misapplication of the money by the attorney, to the same extent as if he had executed the judgment himself. *eb*

See ATTACHMENT, 1, 2, 3.

LIMITATIONS, STATUTE OF, 2, 3.

SLANDER.

1. In an action for slander, where the words spoken are not actionable in themselves, but they may become so by reference to the extrinsic circumstances in relation to which they were spoken, as that they were uttered of and concerning the plaintiff's testimony as a witness on the trial of a cause, the plaintiff must show that they were spoken in reference to a judicial proceeding, before a court or officer of competent jurisdiction. *Bonner v. McPhaul*, 106

2. It must be proved that the court or officer before whom the action was pending had jurisdiction of the subject matter of it, with power to administer an oath and to examine and take the testimony of the witness. *eb*

SPECIAL TERM.

See PRACTICE, 2, 3, 6.

STATUTES.

1. Although the general laws affecting the subject, enacted by the British parliament, do not extend to the colonies of Great Britain, unless they are specially named, it seems this is not the rule in regard to those general statutes which relate to the king's prerogative, and his disposal of the crown lands or revenues. *McKineron v. Bliss*, 180

2. Those laws are to operate upon the sovereign and his acts, and are not to affect the subject; and hence the reason of the rule which exempts colonies from the effect of the ordinary legislation of parliament—to wit, that they are not represented—does not apply, and the rule itself should not exist. *eb*

SUBPOENA.

See ATTORNEY.

SUNDAY.

1. Judicial proceedings, on Sunday, are void, at common law; but all other business transactions on that day are valid, unless prohibited by statute. *Per Emott, J. Merritt v. Earle*, 88

2. A contract for work and labor, to be void, under our statute relative to the observance of Sunday, must be expressly and altogether for an act which the law forbids. It must be a contract for servile labor to be performed on Sunday exclusively and expressly, and not on any other day. *eb*

3. A contract for the transportation of property, upon a steamboat, is not void because made on Sunday; nor because the voyage is to commence, and does commence, on Sunday evening. *eb*

See BROOKLYN, CITY OF, 6, 7, 8.

SURROGATE.

1. It is erroneous for a surrogate to allow an administrator's account or claim against the estate, whatever

may be the force of the proof to establish it in the first instance, unless it is accompanied by the affidavit of the administrator stating that such claim is justly due, and that no payments have been made thereon, and that there are no offsets against the same, to the knowledge of the claimant. *Terry v. Dayton*, 519

2. Where it appeared, on the final accounting of an administrator before a surrogate, that the deceased had in his lifetime made advancements to certain of his children, in money, and that the deceased left real estate, which descended to his heirs; *Held* that the advancements, being in money, were properly chargeable in preference on the personal estate, and should be taken into the account by the surrogate, in the distribution of the estate. 519

3. The rule required by equity, and that intended by the statutes, is that advancements made by real estate shall go first against the real estate descended, and be charged upon the shares of heirs and against those who represent those shares; while, on the other hand, advancements made in personal estate or money shall be first accounted for in the distribution of the personalty, and be charged upon the next of kin as such, and upon the shares which they represent. 520

4. When a surrogate has, upon the application of a judgment creditor of a decedent, ascertained and determined that the plaintiff's judgment is a valid and legal claim, or a subsisting demand, against the estate of the deceased, and is justly due and owing therefrom, his duty in respect to such judgment is ended, except to enter the same in a book of his proceedings. *Cleveland v. Whiston*, 544

5. He cannot go further, and ascertain that the judgment creditor owes the devisees of the real estate a certain amount of rent therefor, and then exercise the prerogative of a judge in equity, and apply the same upon the judgment. The legislature has given him no such power. 545

See JURISDICTION, 11 to 14.

T

TAXES AND TAXATION.

See RAIL ROAD COMPANIES, 1, 2, 3

TENANTS IN COMMON.

1. Where a tenant in common of personal property, consisting of shingle mills or machines and of a clap-board or siding mill, and an engine &c. used for operating such machinery and manufacturing lumber, removes such property out of the building in which it is situated, and puts up the mills and engine in a building of his own, in another town, several miles distant, and uses the same there, in the manufacture of his own lumber, this is such a destruction of the property held in common as will support an action by a co-tenant, for the conversion thereof. *Benedict v. Howard*, 569

TRUSTS AND TRUSTEES.

1. The conveyance of a rail road in trust to secure bondholders, with authority to the trustee, on default of the company in paying coupons, to take possession and run the road and collect the income, gives no title to money voluntarily deposited to the credit of the trustee for the payment of coupons, by the officers of the rail road company, when the trustee has not taken possession of, or run the road, nor taken any action against the company by virtue of the trust deed. *Coe v. Beckwith*, 339

2. Money deposited to the credit of a person designated in the deposit as a trustee, under prior instructions to such person and to the depository that the money should be applied to the payment of several creditors, cannot be reached by attachment in favor of one of those creditors, against the debtor, in an action at law. 340

3. The person to whose credit the deposit is so made is a trustee of the fund, and is entitled to apply to a court of equity for instructions in the execution of his trust. 341

4. The creditors have a vested interest in the fund, and the debtor making the deposit cannot afterwards control or divert it. *ib*
5. In an action by the trustee, for instructions from the court, as to the administration of the trust, neither the sheriff holding a warrant of attachment against the depositor, nor the depository of the fund, are necessary parties, where the plaintiff in the attachment suit has been joined as a party. *ib*
6. In such action all the creditors need not, in case they are numerous and unknown to the plaintiff, be joined as parties. *ib*
7. Where a grant for a valuable consideration is made to one person, and the consideration therefor is paid by another, no interest, legal or equitable, vests in, or results to, the latter, upon which a judgment and execution can attach. *McCartney v. Bostwick*, 390
8. The trust which in such cases — where a fraudulent intent is not disproved — results, under the statute, in favor of the creditors of the party paying the consideration, to the extent that may be necessary to satisfy their demands, is a trust which can only be enforced in equity. *ib*
9. A creditor at large cannot institute such a suit in equity, before the recovery of a judgment in our courts, and the return of an execution issued thereon unsatisfied. *ib*
10. A judgment recovered in another state does not constitute a sufficient basis for a suit in equity to enforce a trust in favor of the judgment creditor. The plaintiff must first sue upon such judgment, here, and recover a new judgment and issue an execution thereon, and have it returned unsatisfied, and thus establish the fact that he has exhausted his remedy at law. *ib*

U

UNIVERSITY OF NEW YORK.

See CONSTITUTIONAL LAW, 1, 2, 3.

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USE AND OCCUPATION.

1. To authorize an action for use and occupation, the conventional relation of landlord and tenant must exist between the parties. *Sylvester v. Ralston*, 286
2. Where one goes into possession of land under a contract to purchase, and not as tenant, and in consequence of the vendor's failure to perform the contract, the purchaser abandons the premises, he will not be liable either for rent, or for use and occupation. *ib*

USURY.

1. Where the defense of usury is set up, the defendant is required to show a corrupt and illegal contract by which more than 7 per cent was taken, for the use or loan of the money advanced. *Griggs v. Howe*, 100
2. He is bound to set up the contract in his answer, giving its terms, and the amount of the usurious premium or interest taken by the lender. And the usury must be proved as set up in the pleading. *ib*
3. Where an answer set up one entire contract for the discounting of two drafts for \$1250 each, and the taking of the sum of \$125 as premium or interest, and the proof made out two contracts, each at a discount of one-eighth of one per cent, for the time which would elapse before maturity, but the time for which the discount was taken, or the sum taken was not shown; *it was held* that the variance was fatal to the defense. *ib*
4. Where the defense of usury is set up to an action on a promissory note, and the lender of the money, being called as a witness, refuses to testify, on the ground that his answer might criminate himself, the referee, unless he knows that no usury was in fact taken, should not attempt to compel the witness to answer. *Fellows v. Wilson*, 162
5. If the counsel does not claim that usury has in fact been taken, he should so state, and ask the referee to instruct the witness that a mere agreement for a usurious premium is not criminal. If he fails to do so,

It is too late to raise that question on appeal. *ab*

6. If, after such an explanation, the witness still declines to answer, on the ground that it might criminate himself, it will be equivalent to his swearing that an usurious premium was actually taken. *ab*

V

VARIANCE.

See Usury, 3.

VENDOR AND PURCHASER.

1. At law, a vendor cannot recover the purchase money agreed to be paid by the purchaser, nor the amount of a note given as collateral security for the payment of an installment thereof, unless he is able to give a good title to all the lands described in the agreement. *Lewis v. McMillen*, 396
2. The fact that the purchaser still remains in possession of the premises, and has not surrendered the same to the vendor, will not prevent his setting up, as a defense to an action on a note given for the purchase money, the inability of the vendor to give a good title to a portion of the premises. *ab*
8. In an action by a purchaser of goods, against the vendor, for a breach of the implied warranty of title, on the ground that the goods belonged to another person at the time of the sale, and that the latter has recovered a judgment against the plaintiff for converting the same, the plaintiff need not prove that he has *paid* such judgment. *Burt v. Dewey*, 540
4. Nor is it necessary for him to show that he gave his vendor notice of the suit brought against him by the real owner of the property. His omission to give such notice will only prevent his recovering of the vendor any of the costs of that suit, and will throw the burden upon him of proving, by evidence other than the record of the former suit, that the vendor had no title to the property, at the time he sold it to him. *ab*
5. In an action by a purchaser of goods, against the vendor, for breach of the implied warranty of title, the plaintiff is entitled to recover the price paid by him for the property, with interest. *ab*
6. Although the law tolerates a separation of the apparent from the real ownership of chattels in some cases, when the honesty of the transaction is made to appear, yet when the purposes for which the possession of property is delivered to a buyer are inconsistent with the continued ownership of the vendor, the transaction will be presumed fraudulent as against purchasers and creditors. The form of the transaction will be deemed to be colorable, and the title be held to have vested, absolutely, in the buyer. *Ludden v. Hazen*, 650
7. H. purchased of the plaintiff a quantity of liquors for the purpose of stocking an unlicensed grocery, and gave a receipt therefor, specifying that the same were to remain the property of the seller until paid for; the liquors to be paid for when sold, or returned when called for. *Held* that the transaction could not be upheld as a conditional sale; that by the contract of sale and the delivery of the liquors to H. to make a part of his stock in trade and to be retailed to his customers, the property vested in him, and became liable for his debts. *ab*

W

WIDOW.

There is no legal presumption that a widow occupies the relation of personal representative of her husband. *Heidenheimer v. Wilson*, 636

See CHOSE IN ACTION.
DOMICIL.

WILL.

1. A testator, by his will, among other things, devised to his executors all his real estate, excepting the farm devised to his wife, *in trust* to receive the rents and profits, and after providing that the same should be

paid to his wife, and, on her death, in part to his daughter during her life, or until a division of the estate should take place as thereafter provided, directed the executors, from the residue of such proceeds, to pay on account of the moneys due on bonds and mortgages such payments as they could, and to pay all indebtedness of the estate until the estate should be free, clear and discharged of and from all liens and incumbrances; and until such payments could be made, the executors were authorized to invest such proceeds, from time to time. He also directed that after the estate was free of all liens and incumbrances, the executors should continue to receive all the rents and profits thereof, and to divide the residue of such proceeds among his children, and the issue of any that might be dead, yearly and every year, until all the issue then living of his children, should have arrived at the age of twenty one years. *Held* that none of the provisions of the will, for the accumulation of the rents and profits, were within the terms of the statute relative to accumulations; and that the whole devise to the executors, in trust, was therefore void, and the estate vested in the children of the testator, in fee. *Bean v. Hockman*, 78

2. A testator, by his will, devised as follows: "I give, devise and bequeath to my said wife, all my lands, tenements and real estate, to have and to hold the same to her, her heirs and assigns, upon trust to receive the rents, issues and profits thereof, and apply to the use of, or pay to each of my sons and daughters an equal portion thereof during their respective natural lives; and as to my daughters, to pay them, respectively, their portion of the said rents, issues and profits, on their own separate receipt, free from any control, debts or liabilities of their respective husbands, (if any,) and in all cases in like manner, and with like effect as if sole and unmarried, as to such as shall be married at the time of, or after, my decease." *Held* that the trust was not void as unlawfully suspending the power of alienation; but that both the trust and the devise were valid. 25

3. When it clearly appears, from a will, that the testator has distributed the residue of his property, after making provision for his widow, amongst his children or other persons, in such proportions as he considered them entitled to; and that, to allow the widow to take both the provision of the will and her dower out of the estate would defeat, or materially lessen, the allotments to all or any of the devisees or legatees, the intention of the testator, not to give her both the provision and dower out of his estate, is plainly manifested, and the court should require the widow to elect. *Dodge v. Dodge*, 418

4. A testator, by his will, devised to his wife, during her life, the use of the homestead at T. except such part as he bequeathed to his son. He then gave to her an annuity of \$400 during life, charged upon certain lots situate in the city of New York, which lots were divided among his children. It was provided that those lots should be holden to pay their respective shares of the annuity, in proportion to their assessed valuation in the public inventory of property. It was further provided that the testator's son J. should never possess the right to sell the house and lot devised to him, but that the same should be held by a trustee to be appointed by the court, and the trust should cease at the death of J.; and that J. should not receive any income from the rents or profits of the premises, unless he should become the head of a family; in which case the entire annual income should accrue to him; or if J. should remain single at the age of 40 years and upwards, and become infirm or unable to support himself, the trustee was directed to grant him an annuity of \$100 for his support. It was further provided that as there were certain incumbrances upon the New York lots, the proceeds and profits of the estate, after the necessary current expenses were paid therefrom, should be appropriated to pay the annuity. *Held* that the provisions of the will, in behalf of the testator's children, demonstrated that it was not his intention to give the widow both dower and the annuity; and that she was bound to elect between the annuity and her dower. 25

5. The real and personal estate of a testatrix were, by her will, directed to be converted into money by her executors, and after the payment of debts, &c., the proceeds were disposed of as follows: One third part was given to E. S.; one third part to M. S., the executor, in trust for S. V. S. and her children; and the remaining third part was directed to be put at interest on bond and mortgage, or otherwise securely invested, during the lifetime of J. J. V., and the net annual income thereof paid over to him during his life, with remainder over, of three-fourths thereof, to her nephews, F., J. and S., and of one-fourth part thereof to her surviving executor, in trust for J. V. W. The inventory of the personal estate made April 10, 1845, included a mortgage, given by one W. on certain lots at Harlem, on which there was due the sum of \$1612.81. This mortgage the executors proceeded to foreclose, and bid the same in for the sum of \$750. at the master's sale, and took a deed therefor, April 18, 1846. In April, 1859, the executors sold the lots, and realized from the sale \$8451, over and above all expenses, &c. *Held*, 1. That the sale of the property to the executors, under the decree in the foreclosure suit, effected no change in the nature of the property, so far as the executors, distributees and *cestuis que trust* were concerned; and that although the title was absolute in the executors, they held it precisely as they held the mortgage security. 2. That the sum of \$8451, realized by the executors from the sale of the mortgaged premises, was, after deducting the executors' commissions, to be applied as follows: 1st. To replace the sum of \$1612.81 which the Harlem lots owed to the principal of the estate, one third part of which was the property of E. S.; one third part to remain with M. S. as trustee for S. V. S. and her children; and the remaining one third was to be invested at interest for the use of J. J. V. during life, with remainder over, &c. 2d. That from the proceeds of the sale there should next be taken the interest upon the sum of \$1612.81 from April 10, 1845, and one third part thereof paid to E. S.; one third part to M. S. trustee for S. V. S. and her children; and the remaining

third part paid to J. J. V. for his own use, and in satisfaction of his interest in the income of the fund. 3d. That whatever should remain, after those deductions and payments, and after paying the costs, was to be regarded as a part of the principal of the estate, and should be appropriated in the same manner as before directed in respect to the principal sum of \$1612.81. *Schoonmaker v. Van Wyck*, 457

6. A testator, by his will, devised to his wife, for life, certain real estate. He made other devises, and then devised and bequeathed one third part of the rest, residue, remainder and reversion of his estate, real and personal, to M., the defendant, and to the heirs of her body forever; and in case of her death without issue then living, he devised and bequeathed her said portion, to be divided in equal parts, to the Trustees of the Theological Seminary of Auburn, and to the Trustees of the Buffalo Orphan Asylum, in fee forever, for the uses and purposes contemplated by their respective charters. He then devised and bequeathed to C. and the heirs of his body, forever, another third. And in case of C.'s death without issue then living, the testator devised and bequeathed his said portion, to be divided in equal parts, to the Trustees of the Theological Seminary, and to the Trustees of the said Orphan Asylum, in fee, forever, for the like uses and purposes. The widow died in 1855, and C. died in 1857 without issue then living. The Trustees of the Theological Seminary claimed, under the will, one sixth of the rest, residue, remainder and reversion of the estate, and the plaintiff, who was a sister of C., claimed it as heir at law of C. At the death of the testator the Theological Seminary was not authorized, by its charter, or by statute, to take real estate by devise, but it had capacity to do so at the time of the death of C. *Held*, 1. That the estate attempted to be devised to the Theological Seminary was not an executory devise, but was a contingent remainder, and would have been such at common law. 2. That inasmuch as the Theological Seminary had no power to take, at the time of the testator's death, and the testator did not contemplate that

any additional capacity should be conferred upon it, to enable it to take such remainder, the devise to the Trustees of the Theological Seminary was void. 8. That the Trustees of the Theological Seminary had no title to, or interest in, the real estate of the testator; but that the plaintiff was seized in fee, as the heir of C., of the one half of the undivided third devised to C. *Leslie v. Marshall*, 560

7. All the contingencies upon which an estate, created by will, is to depend, must be contained in the will; and the courts cannot change the estate, by incorporating any other contingency or condition. Per MARVIN, J. *ib*

Probate of will. See JURISDICTION, 14.

WITNESS.

1. The provision in the 899th section of the code, that a party shall not be examined as a witness unless the adverse party or person in interest is living, does not exclude a party from being a witness when the opposite party is a corporation. *Johnson v. McIntosh*, 267
2. In an action brought by husband and wife, to cancel a bond and mortgage executed by them, and to restrain the foreclosure of the mortgage, the husband offered himself as a witness to prove usury in the consideration. *Held* that the husband was a competent witness on his own behalf, notwithstanding the wife's interest in the event of the suit, by reason of her inchoate right of dower in the mortgaged premises. *Babbott v. Thomas*, 277
3. A party to the record in proceedings before a surrogate upon the final accounting of an administrator, is not a competent witness. *Terry v. Dayton*, 519
4. Neither the act of December 14, 1847, authorizing parties in civil suits to obtain the testimony of the adverse party, nor the 899th section of the code, authorizing parties to be examined on their own behalf, has any reference to proceedings before a surrogate. *ib*

See LIBEL, 7.

WORK AND LABOR.

1. Where a party enters into a contract to work for another for a term of years, at a specified sum per annum, payable quarterly, and is discharged by his employer before the end of the term, he has three remedies, either of which he may pursue at his election. 1. He may, the moment the contract is broken, bring a special action to recover the damages arising from the breach; 2. He may treat the contract as rescinded, and immediately sue on the *quantum meruit*, for the work actually performed; or 3. He may wait until the termination of the period for which he was hired, and claim as damages the wages agreed to be paid, by the contract. *Colburn v. Woodworth*, 881
2. But a party cannot, under such circumstances, pursue all these remedies, in separate actions. An action upon one, and judgment upon it, will operate as a bar to any further action. *ib*
3. Thus, if a person, hired for three years, is discharged by his employer during the second quarter, and sues to recover for arrears of wages, and damages for the breach, and recovers a judgment for one quarter's wages, this will be a bar to a second suit, upon the same contract, for wages of the subsequent quarters of the first year and damages. *ib*
4. And this, notwithstanding the referee decided, in the former action, that the plaintiff could only recover one quarter's wages, and the court ordered judgment in accordance with such decision. *ib*
5. If a party submits his claim, to be passed upon, this will operate as a bar to a subsequent suit, even though the decision of the court thereon be erroneous; provided the cause of action has then accrued. *ib*
6. The error, if any, must be corrected in that action, by review of the verdict or judgment; and not by a new action for the same cause. *ib*

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